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The Dropout Controversy — *Chester E. Finn, Jr./ Jackson Toby*

AIDS—Policies and Prospects

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An overview

ISABEL V. SAWHILL

VIOLENT CRIME, drug abuse, teen pregnancy, illiteracy, joblessness—these are some of the hallmarks of what has come to be called "the underclass." Public impressions of the group are based primarily on television and newspaper stories. Each new report of a drug-related murder, a street mugging, an example of indiscipline in the schools, a youth gang terrorizing an entire neighborhood, or a welfare mother planning her eighth child leaves the average citizen wondering what has happened to basic values and to the institutions most responsible for transmitting them. The family is implicated, but no one knows how to solve its problems. Poverty is implicated, although in the past incomes were lower but behavior was nonetheless better. Race is implicated, if only because of the extent of minority involvement. The economy is blamed for discarding the untutored, the schools for having graduated them. And the federal government is charged with worsening the social problems that its War on Poverty set out to eradicate. Everyone has a theory, but no one really knows why the social fabric of certain communities has deteriorated so badly.

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What lies behind these popular impressions? Does America have an underclass? If so, how big is it? What does its existence imply for American society and public policy?

Defining the underclass

Some have claimed that the term "underclass" is simply a new and more pejorative label for poor people. Their point is well taken; if the term is to be useful, the underclass must be distinguished from the poor.

Poverty is now sharply defined. A poor person is anyone living in a household whose annual income falls below certain well-specified (if arbitrary) limits that vary with family size. A family of four, for example, was poor in 1987 if its annual income fell below $11,611. The figures are adjusted each year for changes in the cost of living. While the resulting measures of poverty indicate the adequacy of a family's cash income, they tell us nothing about the duration, the causes, or the social significance of this low income; graduate students, small-business owners, welfare recipients, and elderly widows are all lumped together. By ignoring this diversity, conventional measures of poverty hide as much as they reveal. We can partially avoid this problem by breaking things down into narrower categories. In 1987, for example, of the 32 million poor people in the United States, roughly one-third were elderly or disabled; another one-third were temporarily poor as the result of divorce, the loss of a job, or another misfortune; and the final one-third were chronically poor though able-bodied (that is, neither elderly nor disabled). If there is an underclass in America, it seems reasonable to assume that it comes from this third group. Indeed, some scholars have defined the underclass in precisely these terms—as those who are chronically poor. But this definition may miss what is most distinctive, most interesting, and most troubling about the underclass: its behavior.

Consider two individuals: an elderly widow with a permanently low income and a drug dealer whose income is at least temporarily high. The former evokes compassion, the latter fear. The problem posed by the widow can be solved by transferring money from the more to the less fortunate, but the problem posed by the drug dealer cannot. Most essentially, the first person lives by society's rules, whereas the second breaks them. It is not just laws that matter; there are also unwritten rules or social norms that guide behavior. Both laws and social norms are means of assuring that individual

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actions produce beneficial social results. Behavior that conflicts with existing laws and norms often harms the rest of society, threatens social stability, or dims prospects for future generations.

Laws and mores may vary with time and place, but in America today certain norms are widely held. First, children are expected to study hard and complete at least high school. Second, young people are expected to refrain from conceiving children until they have the personal and financial resources to support them; this usually means delaying childbearing until they have completed school and can draw on a regular salary. Third, adults are expected to work at a steady job, unless they are retired, disabled, or are supported by their spouse. Fourth, everyone is expected to obey the laws.

These are social obligations. Those who fulfill them are unlikely to be chronically poor. If they are poor despite having abided by the rules, society is much more likely to come to their rescue. This is and (with the possible exception of the 1960s) always has been the nature of the social contract. The problem is too many people who are not fulfilling their end of the bargain; these people constitute the underclass. Have such people failed society, or has society failed them? Before delving into this controversy it will be useful to examine the magnitude of the underclass problem.

Size and composition

To better understand the dimensions of the problem, my colleagues and I at The Urban Institute have used 1980 census data to identify neighborhoods where dysfunctional behavior has become commonplace. We focused on school dropout rates, numbers of female-headed families with children, welfare dependency, and joblessness or irregular employment among adult males. (These are somewhat imperfect proxies for underclass behavior. For example, census data give no measure of criminality or teenage childbearing. After experimenting with the somewhat better data that we were able to obtain for one or two cities, however, we do not believe that these limitations much influenced our overall results.) To qualify as an "underclass area," a neighborhood (or census tract) must score high on all four of the above indicators simultaneously. "High" in this context means at least one standard deviation above the mean for the country as a whole. For example, for the nation as a whole the proportion of families with children headed by a woman was 19 percent in 1980; to qualify as an underclass area,

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the proportion had to be at least 37 percent. The average for the underclass areas that we identified was 60 percent.

Using this approach, we identified 880 underclass neighborhoods around the country in 1980. These neighborhoods contained 2.5 million people. Of these, 1.1 million were poor. Not all of the adults in these areas are literally members of the underclass in the sense that they are engaged in dysfunctional behavior (although our rough estimates suggest that about half are). Nevertheless, the environment is not conducive to completing school, living in a stable family, or having a steady job. Moreover, about one-third of the residents of these neighborhoods are children whose prospects for upward mobility seem particularly dim.

Underclass neighborhoods are often thought of as "inner-city areas" or "ghettos." Our data indicate that they are, indeed, distinctly urban places; we find almost none in rural America. This disparity is partly explained by the fact that the Census Bureau does not define tracts in sparsely settled areas. Still, large cities in the Northeast and Midwest have more than their share of underclass neighborhoods. These neighborhoods also tend to be ghettos, in that they are disproportionately populated by minorities. In 1980 59 percent of the residents were black and 12 percent were Hispanic. Most striking, perhaps, is the lack of education in these communities: in 1980 almost two-thirds of the adults had not graduated from high school. In addition, males are in short supply; we found six women for every five men. Some of this imbalance may reflect the difficulty that census takers have in locating low-income black males. But high rates of homicide and incarceration are also involved.

Other scholars have come up with different estimates of the size and composition of the underclass, but their conclusions are quite similar. First, the underclass is small. Most poor people are not part of it; in 1980, for example, 29 million Americans lived in poverty, but we found only 1.1 million of them in underclass areas. Second, it is a heavily minority population. This fact, together with increasing public concern about the most visible elements of the underclass, threatens to exacerbate racial tensions and strengthen prejudices. Yet it should be noted that less than 6 percent of the black population and less than one-fifth of the black poverty population live in what we have labelled underclass areas.

Our data indicate that between 1970 and 1980 the number of people living in underclass areas grew more than threefold—from

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752,000 to 2,484,000. The incidence of poverty for the country as a whole also increased during this period, but not nearly so much. In fact, based on a review of much of the earlier literature on inner-city communities, William Julius Wilson concludes that crime, joblessness, single-parent families, and welfare dependency were all much less common before 1960 despite a much higher rate of poverty in these communities. During the 1970s poverty became increasingly concentrated in inner-city areas and was associated with a higher incidence of social problems than in the past.

From everything we can tell, these trends have continued through the 1980s. By 1987 the overall poverty rate was about as high as it had been in 1980, despite a long and robust economic recovery. And the incidence of dysfunctional behavior appears, if anything, to have increased. A survey of black households in the poorest areas of eight cities, conducted by Louis Harris and Associates, found a higher incidence of irregular male employment, welfare dependency, and single parenthood than we found in 1980. To be sure, the data in the two studies are not exactly comparable. Nevertheless, it is fair to conclude that the problem is growing: increasing numbers of people—both absolutely and relative to the total population—are living in communities where poverty and social dislocation are pervasive and persistent.

What might be driving these trends? One possibility is that upward mobility still exists, but that as fast as one group moves out of the ghetto, a new and larger disadvantaged group moves in. The evidence, however, does not support this thesis. According to demographers like Michael White, inner-city areas were losing population between 1970 and 1980. The earlier flow of blacks from the rural South had stopped by the 1960s; there was instead a net exodus of blacks from the central cities to the suburbs during the 1970s.

What the evidence *does* show is that the more advantaged have left faster than the less advantaged. In addition, conditions have deteriorated in what were already marginal areas. The result is that many neighborhoods have "tipped"—that is, become areas of concentrated poverty and underclass behavior. In a detailed look at these transitional neighborhoods in Philadelphia, Mary Jo Bane and Paul Jargowsky estimate that between one-half and two-thirds of the increase in the concentration of poverty in these neighborhoods during the 1970s was due to the relatively rapid migration of the better-off residents. The remainder was due to an increase in

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poverty among the existing population; none of the increase was due to an influx of poor people from other areas. Similarly, our own study shows that the growth of the underclass between 1970 and 1980 was due almost entirely to the appearance of new underclass neighborhoods rather than to an increase of population in existing areas. Often these new areas abut existing underclass neighborhoods, suggesting that the ghetto and the conditions that we associate with it are simply spreading.

One cause of the spread could be high fertility rates within these neighborhoods. Although available data do not entirely exclude this possibility, it seems highly unlikely. Nationally, birth rates among black women of childbearing age fell sharply in the 1970s.

Under most reasonable assumptions, differential rates of outmigration alone cannot explain an absolute increase in the size of the underclass. If our suppositions about in-migration and fertility are right, then we must assume that the underclass is growing because of worsening conditions in the ghetto itself that have impeded escape or that have dragged formerly working-class families into the underclass. Thus, in addition to low rates of upward mobility among low-income families living in underclass areas, there may have been some downward mobility among middle- or working-class families, especially those living in, or close to, the ghetto. And given high levels of residential segregation by race (levels that have not declined much since 1970 and that still exceed the degree of residential segregation by income class), one can come up with a story that involves blacks in disproportionate numbers. Black working-class families living in or near ghettos can easily lose their children to poor schools, crime-infested neighborhoods, and peer pressures to use drugs or have sex, especially if the parents themselves are barely making ends meet.

Additional research may reveal that the facts do not support this scenario in all its particulars, but it is a good place to start. In the meantime, the question remains: What more fundamental forces may be limiting upward mobility in inner-city areas?

Why a growing underclass?

Although a number of researchers are tracking down answers, the reasons for the growth of the underclass remain somewhat elusive. The major competing explanations (which are in no way mutually exclusive) are changes in the number and types of jobs

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available to inner-city residents, the growth of alternative sources of income—such as welfare, crime, and hustling—that make regular work less necessary, and a deepening culture of poverty associated with the increased isolation and relative deprivation of the poor in general and poor minorities in particular.

As already noted, regular employment is relatively rare among ghetto dwellers. In 1979, 56 percent of the adult males in underclass areas were employed less than half the year. In the 1988 Louis Harris survey, 82 percent of the households that contained any adult males reported that at least one of these males was not regularly employed. National data indicate that the labor-force participation of black males aged twenty to forty-four has dropped steadily, from 91 percent in 1970 to 87 percent in 1987. No such trend is evident among white males in this age group.

One possible explanation of these trends is the economy's failure to generate enough jobs. If unskilled members of minority groups are hired last because of discrimination and poor qualifications, then fluctuations in the national economy throw them in and out of the labor market, and prolonged periods of high unemployment leave them adrift. Given that the unemployment rate averaged 8.2 percent in the first half of the 1980s—as compared with 3.7 percent in the last half of the 1960s and 6.1 percent in the 1970s—such arguments cannot be dismissed.

Another explanation points to changes in the type and location of available work. The growth of white-collar jobs in the cities means that more urban jobs demand education, while the migration of manufacturing to the suburbs or to other countries has dried up opportunities for unskilled workers. According to John Kasarda of the University of North Carolina, in New York City during the 1970s the number of jobs typically filled by people who had not finished high school declined by 40 percent, while the number of jobs typically filled by people who had attended college increased by 61 percent. Similar figures hold in other cities. Since about two-thirds of the residents of underclass areas have not finished high school, it would be surprising if this shift in the structure of the economy were not hurting them. In fact, our own preliminary research suggests that it has been a major factor in the growth of the underclass. This structural transformation has been complemented by adverse macroeconomic conditions and by the increasing availability of other sources of low-wage labor such as women, immigrants, and youths—all of whom have flooded into the job

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market since 1970. The combination of slack labor markets and plentiful entry-level workers enabled employers to raise their hiring requirements.

Yet the real source of the problem is the low levels of education and literacy that put ghetto residents at the end of the hiring queue in the first place. One can hardly overestimate the importance of this factor. According to the National Assessment for Educational Progress, the average seventeen-year-old from a disadvantaged urban community is still reading at an eighth-grade level.

Whatever jobs are available to such poorly educated people, moreover, must compete with alternative sources of income in the ghetto. Crime, welfare, and hustling pay a lot better than the kinds of jobs that inner-city residents can get. In twenty-three states, welfare and related benefits for a mother and two children pay more than a full-time, minimum-wage job. To be sure, real welfare benefits have fallen by 37 percent since 1970 at the same time that the underclass has grown, and researchers have found little correlation between state benefit levels and the proportion of families headed by women. But it is hard to imagine that the availability of this reasonably steady, albeit small, income has had no impact on life in inner-city communities.

Crime is also an important source of income in the ghetto, and may be becoming more so as a result of the flourishing drug trade. A recent Urban Institute study of ninth- and tenth-grade boys from low-income areas in the District of Columbia found that these students consider drug dealing a very lucrative business. A majority of those heavily involved in drug sales, who presumably speak from experience, report that it is possible to earn at least $1000 a week. An older (1979) study, conducted by the National Bureau of Economic Research, found that crime accounted for about one-fourth of the income received by inner-city minority youths aged sixteen to twenty-four in Boston, Chicago, and Philadelphia. When asked whether a job or "the street" provided better economic opportunities, one-third favored the latter. Their answer undoubtedly reflects not only the availability of significant opportunities to earn money illegally, but also a disturbingly accurate perception that the chance of being arrested, convicted, and sent to jail is very low.

More evidence concerning the growth of irregular and informal sources of money in low-income communities comes from Christopher Jencks of Northwestern University. Jencks found that the ratio of consumption to income among the poor rose from 1.25 in

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the early 1960s to 1.85 in the early 1970s and to 2.73 in the mid-1980s.

The behavior that characterizes the underclass has to be understood, at least in part, as a response to these economic realities. But it is a vicious cycle in which the behavior in turn makes economic success less likely. The seeming inability of public schools to overcome the initial handicaps of children born into poor and often unstable families produces young people who cannot compete for anything other than the most marginal jobs. Given their poor economic prospects, such adolescents find other outlets for their energies and other sources of status, including exploitative sexual relationships, early out-of-wedlock childbearing, and involvement in drugs and crime. The cycle may then repeat itself in the next generation.

Once crime, dropping out of school, teenage childbearing, and joblessness become commonplace, they are likely to become more acceptable. Such a shift in social norms leads in turn to more bad behavior. To study hard, to defer childbearing, to take a low-paid job, to marry one's girlfriend—these are not what most members of the community expect one to do. Indeed, those who respect traditional norms may even be viewed as "chumps" or "losers." Such attitudes may derive from a sense of frustration or even despair; once established, they can have powerful effects on behavior, especially among adolescents, who are everywhere notoriously responsive to peer pressures and who have few positive role models or restraining influences in inner-city areas.

Evidence for such effects comes most strongly from ethnographic studies in low-income communities, many of them dating back to the 1960s. It also comes from more quantitative research that is beginning to identify neighborhood environment as an independent influence on various behaviors, and from studies that suggest that welfare dependency and a failure to form stable families may be passed from parent to child. These studies confirm the common-sense intuition that people are locked into the ghetto not just by their lack of opportunities but also by cultural factors. Material circumstances and social imperatives interact in ways that undoubtedly cause the process to feed on itself, making the problems more stubborn and intractable than they otherwise would be.

Still, Americans typically believe that people can get ahead, despite economic and cultural constraints, through education and

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work and by drawing on community and family resources in hard times. This has in fact been the pattern for most immigrant groups. Certain behaviors produce more income, more regard from society, and more self-respect. These behaviors must be supported and encouraged. The question should not be how to make people richer so much as how to make them more self-sufficient, self-respecting members of the community.

Focusing on behavior may seem to imply that escape from the ghetto is a matter of personal choice. Liberals complain about blaming the victims; they argue that poor people's choices are severely constrained by poverty, inadequate public services (especially schools), lack of jobs, and discrimination. Conservatives counter that opportunities exist, if only people would take advantage of them. Facts can be marshalled on both sides of this debate; the truth probably lies somewhere in the middle and is more complicated than either side wants to admit.

We could begin by reminding ourselves that some things are *not* a matter of choice. Those who are successful tend to underestimate the role of chance in their success. People cannot choose the natural endowments that they receive at birth, including genetic predispositions affecting physical and mental health, intelligence, and motivation. In addition, people cannot choose their early environment—the kind of family or neighborhood into which they are born. If one has the ill fortune to be born to parents who are abusive, badly educated, immature, or extremely poor, one's attitudes and behaviors are almost bound to be affected and one's prospects dimmed; if on top of this the social norms in one's community push one in the wrong direction, further damage may be done. Finally, people cannot choose their race or gender, attributes that still matter in American life. If society brands people as inferior on grounds of class, race, and gender, their self-esteem and then their prospects for success can suffer.

Within these parameters—and they can be quite confining—people do have choices. The objective of public policy should be to widen people's choices and to reward those who take responsibility for their own lives.

Policy directions

Several things can be done. First, we should invest in children. Investing in children is expensive but may still be the most cost-

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effective way to break the cycle of poverty and social dissolution that besets the underclass. Programs with records of success already exist, such as prenatal care, nutrition assistance, preschool enrichment, and compensatory education. It would cost $10 to $15 billion annually to expand such programs to serve a reasonable proportion of the eligible population and to support more innovative local approaches, including some targeted at underclass areas. Any such expansion would need to be combined with serious efforts to improve inner-city schools. Experts tell us that effective school principals are essential. The best ones should be singled out for further training or support and richly rewarded for their efforts. The inner city is a war zone; those who are willing to serve in it ought to be compensated accordingly. High salaries and more flexible certification procedures could attract the best and the brightest into these areas. Especially attractive packages of higher educational assistance to talented minority students willing to commit themselves to such careers might also help.

Providing support for families who want to move out of the ghetto is equally important. Public-housing projects are, at best, foxholes in the underclass battleground and, at worst, enemy territory. Families who want to do well by their children no longer consider them safe or healthy. Crime and drugs are too prevalent. Peer pressures are hard for parents, especially single parents, to fight. Schools and employment opportunities are better in the suburbs. Substituting housing vouchers for public-housing construction would be sensible. So would more efforts like Chicago's Gautreaux project, which quietly, and after careful screening, moves inner-city black families from public housing projects to suburban neighborhoods where their rents are subsidized. Families should be selected partly on the basis of their commitment to work and to provide educational opportunities for their children. Such efforts would complement and hasten the natural emptying of ghetto areas. Although these areas may suffer further social and economic deterioration as a result, our ultimate goal should be to improve individual lives.

Furthermore, we should replace the welfare system with income support that is more closely tied to employment. Many thoughtful analysts have criticized the current system and suggested reforms. Though the details of their proposals vary, all would eliminate income transfers as a source of *long-term* support for families that are headed by an able-bodied adult. Most would

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emphasize the child-support responsibilities of absent parents. And most would provide additional assistance or subsidies to the working poor. The recently enacted Family Support Act incorporates many of their views. In addition, there is now bipartisan support for an expanded Earned Income Tax Credit and other measures to help the working poor. These efforts may not be enough to stem the growth of the underclass, but they are steps in the right direction.

I would add to these efforts a stronger incentive for young people to complete their educations and to defer childbearing. Early childbearing harms the prospects of not just one generation but two. Teenage mothers with interrupted educations have relatively poor employment and marriage prospects; as a result, they account for the bulk of long-term welfare costs. Their children suffer greater cognitive and emotional difficulties than other children and are more likely to be abused and neglected. Abuse and neglect, in turn, are related to later violent crime and may have other consequences such as withdrawal or depression. A variety of responses is needed. Sex education, more school-based clinics where contraceptives are available, and abortion all have a role to play, as does the possible deterrent effect on young males of stronger and more consistent enforcement of child-support obligations.

There is currently no real reward, however, for those teenagers who defer childbearing. Indeed, the welfare system and the social norms in inner-city communities tilt in the other direction. As a practical matter, relatively generous rewards may be needed to turn the situation around. They can be justified because the gains to society in terms of welfare-cost savings and the development of the next generation are substantial. For these reasons, some thought should be given to promising every teenager from an impoverished inner-city family a generous voucher that could be used for such approved purposes as getting a college education, vocational training, or on-the-job training in a community-service job. If these vouchers were targeted on schools in underclass areas, they would not be terribly expensive. It might cost roughly $40 billion to give a $5000 voucher to every member of each year's graduating class. But not everyone would qualify. Receipt of a voucher would be conditional on remaining childless and finishing high school with a reasonable academic record. The childbearing rule would include young men as well as women—though it would, admittedly, be more difficult to enforce among males who were determined to conceal their paternity. An all-out campaign that included the stick

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of child-support enforcement together with the carrot of a voucher could begin to improve current behavior patterns, especially if community leaders supported this objective. The education and training activities themselves would be designed to prepare young people for something other than the dead-end jobs now available to them, and they would give them a future to work toward while they were still in school.

None of these suggestions is guaranteed to work; most of them will be controversial. The task of reducing chronic poverty and the growth of the underclass is daunting. It is not just individuals who need to be saved but whole communities in a long, slow process that recognizes the depth and self-perpetuating nature of current behavior patterns. The overall objective should be to give people better choices than they now have, both by creating opportunities and by giving them a clearer sense of personal responsibility. To argue that upward mobility depends on just one or the other is to miss half the story.

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Toward a post-industrial social policy

DANIEL PATRICK MOYNIHAN

Speaking generally, it may be said that she was sometimes beautiful, at other times not beautiful, according to the state of her health and spirits.

—*Thomas Hardy,* The Woodlanders

A QUARTER of a century has elapsed since I sat alongside Sargent Shriver in the hearing room of the House Committee on Education and Labor as he presented the opening testimony on what was to become the Economic Opportunity Act of 1964, which launched the War on Poverty.

In recent years, many have judged this effort a failure. Not least among the naysayers was former President Ronald Reagan, who was fond of declaring that "the federal government declared war on poverty, and poverty won."

In a new political setting, in which we may hope for a more or less deliberate return to social policy, a wholly different view is possible. If one sees the 1960s and early 1970s as the culmination

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of a long effort, beginning in the Progressive era, to eliminate the particular kinds of poverty and distress associated with industrialism, they were hugely successful years. The effort could not, however, deal successfully with an emergent form of dependency: the kind associated with *post*-industrial society.

As formulated by Daniel Bell, the term "post-industrial" refers primarily to the old and established question of modes of production. For Bell, the "axial principle" of this evolving social structure is the "centrality of theoretical knowledge as the source of innovation and of policy formation."

Along with this new form of society has come a new form of social distress, associated with the "post-marital" family. As yet we have no explanation for this development, nor any great ground for thinking that we ever will. We do know, however, just how sharp and sudden the change was. It began at midcentury and has not yet stopped. Its suddenness and unexpectedness at least partially explain our inability so far to respond. Early indicators—for example, those that I came upon in 1962 and 1963—were dismissed as aberrant or even malevolent. (This is not unusual; social scientists must learn to live with hostility, and probably should even be trained to prepare for it.) But we would be foolish indeed not to distinguish between the new problems that we have not yet addressed and the older ones that we successfully took on.

The century-long effort to deal with *industrial* poverty is roughly divisible into three noteworthy periods of energy and action. Using presidential terms as markers, the first period extended from Theodore Roosevelt to Wilson (1901-1921), the second period from Franklin Roosevelt to Truman (1933-1953), and the third from Kennedy to Nixon (1961-1974). Some will note, correctly, that this does not exclude many presidents. The assault upon poverty was almost continuous, but in some periods it was undertaken with particular energy.

The key to understanding the third period is the realization that the essential social legislation of the years 1961-1974 merely extended and concluded the initiatives of the previous periods. Medicaid and Medicare (1965) provided the health insurance that Truman had called for; the indexation of Social Security benefits (1972) ensured the stability of Franklin Roosevelt's retirement-benefits measures; Supplemental Security Income (1972) broadened the benefits for the indigent aged, blind, and disabled, many of which date from the Progressive era.

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Each of these programs provided for cash transfers or for services in kind—such as health care—that would otherwise have had to be purchased or forgone. Each had precedents in the social legislation of Europe, where industrialization had simultaneously created new social problems, like unemployment, and the collective resources with which to address them.

Nathan Glazer was the first to suggest that some of these "old" programs might create or perhaps "abet" new problems. As he puts it, we come up against the "limits of social policy" when welfare programs designed to deal with the breakdown of traditional structures weaken them further, "making matters in some important respects worse." The planners of the 1960s' poverty programs were not unaware of such anomalies.[1]

Launching the War on Poverty

Many of the difficulties in attacking poverty could already be seen in the report of the President's Task Force on Manpower Conservation, entitled *One-Third of a Nation: A Report on Young Men Found Unqualified for Military Service*; as much as anything it served as the data base from which we fashioned the Economic Opportunity Act of 1964. It was a project that I had conceived in the summer of 1963 as Assistant Secretary of Labor for Policy Planning and Research. At that time, half the young men called up for military service failed either the mental or the physical test, or both. I conceived the report as a way of making the case for our Youth Employment Act, which was then languishing. (It subsequently became Title I of the Economic Opportunity Act.) A survey of 2500 young men who had failed the Armed Forces Qualification Test was undertaken, enabling us to "correct," as statisticians say, for that fact that not all the eligible males were actually tested or examined. (Some were in college, some had enlisted, and so on.) We established that if everyone had been called up, the rejection rate would have been one-third.

[1]Even in the heady days of the Fabian Society, the Webbs recorded apprehensions of this sort. See Beatrice Webb's *Our Partnership* (London: Longman's, 1948), p. 479: "To us, the compulsory insurance with automatically distributed money, allowances during illness or worklessness, with free choice of doctor under the panel system, would not and could not prevent the occurrence of sickness or unemployment. Indeed, the fact that sick and unemployed persons were entitled to money incomes without any corresponding obligation to get well and keep well, or to seek and keep employment, seemed to us likely to encourage malingering and a disinclination to work for their livelihood."

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The report was finished and presented to President Johnson by New Year's 1964. On January 5, the president issued a statement that I believe I drafted; in any case it reflects my understanding at the time. The statement begins:

> I am releasing today the report of the Task Force on Manpower Conservation, appointed by President Kennedy on September 30, 1963. I regard with utmost concern the two principal findings of that report.
>
> First, that one-third of the nation's youth would, on examination, be found unqualified on the basis of standards set up for military service and
>
> Second, that poverty is the principal reason why these young men fail to meet those physical and mental standards.
>
> The findings of the Task Force are dramatic evidence that poverty is still with us, still exacting its price in spoiled lives and failed expectations. For entirely too many Americans the promise of American life is not being kept. In a nation as rich and productive as ours this is an intolerable situation.
>
> I shall shortly present to the Congress a program designed to attack the roots of poverty in our cities and rural areas. I wish to see an America in which no young person, whatever the circumstances, shall reach the age of twenty-one without the health, education, and skills that will give him an opportunity to be an effective citizen and a self-supporting individual. This opportunity is too often denied to those who grow up in a background of poverty.

Looking back, I no longer have the confidence I then had in the second finding. Indeed, it now seems to me that the data could lead to quite different conclusions. The overall proportion of those ineligible to serve—one-third—was a composite of hugely varied rates of mental and medical failure, both between subgroups in the population and between political jurisdictions. Furthermore, the latter differences were the most pronounced. Thus, while 34.2 percent of New York State's 1962 draftees failed the mental test, only 14.3 percent of nearby Rhode Island's and 6.4 percent of Vermont's could not pass it.

Why did I write that this was the result of poverty? Why did I not write that poverty was the result of *this*? Ignorance, as Dr. Johnson observed. I do not know how to describe my understanding of social structure a quarter of a century ago, except to say that it was not especially formed. I was surely no Marxist. What the eminent German sociologist Ralf Dahrendorf was to call the "concealed romanticism of a revolutionary Utopia *à la* ... Marx" had never in the least appealed to me. (Nor to this moment do I understand how it could have captivated three generations in our cen-

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tury.) Yet I thought, as a good Madisonian, that the "various and unequal distribution of property" accounted for many social phenomena. What I had not adequately grasped was the degree to which these unequal distributions of property were in turn dependent upon a still more powerful agent—the behavior of individuals and communities.

The importance of behavior

Dahrendorf had but two years earlier given his lecture "On the Origins of Inequality among Men" at the University of Tübingen. I came upon it in 1968, shortly after it appeared in English (in a selection of Dahrendorf's works entitled *Essays in the Theory of Society*), and may then have begun, for the first time, to think to some purpose about this subject.

The essay is readily available and needs only to be summarized. In it, Dahrendorf argues that all societies establish norms of behavior to which some individuals adapt better than others, and hence that inequality is inevitable. Thus the notion that abolishing private property could end inequality is romantic and naive. Even in a "classless" society, social expectations would exist, and those who best fulfilled them would have a higher status than those who did not. Social stratification of some kind cannot be avoided.

> [T]he hard core of social inequality can always be found in the fact that men as the incumbents of social roles are subject, according to how their roles relate to the dominant expectational principles of society, to sanctions designed to enforce these principles.

Dahrendorf's model of social stratification, it should be clear, is value-free. The normative orders that different societies reward can be vastly disparate, ranging from that of St. Francis of Assisi to that of Vlad the Impaler. But in either case, some will excel at charity, others at barbarity, and inequality will ensue.

Returning from Dahrendorf to *One-Third of a Nation*, I am struck by the prominence of the variation among the different states: the state with the highest proportion of persons failing the mental examination had a rate nineteen times as great as the state with the lowest. The lowest was Minnesota, whose failure rate was 2.7 percent. This is scarcely above the incidence of mental retardation in a large population. South Carolina, in which 51.8 percent failed, was wildly out of line. What was going on?

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The answer, surely, is that people in different states were behaving differently, rewarding and punishing different things. The Constitution was the same in every state, as was the material culture. Yet some jurisdictions were turning out many more citizens who were presumably going to be poor than others. Economics alone could not account for much of the difference, surely not between jurisdictions as comparable as Rhode Island and New York. There is no more elemental form of wealth than a well-educated, healthy cohort of young people. Some parts of the United States were producing this "wealth" in abundance, whereas others were becoming seedbeds of post-industrial poverty.

Hence, this "third" period of social reform was most successful—was hugely successful—where we simply transferred income and services to a stable, settled group like the elderly. It had little success—if you like, it failed—where poverty stemmed from social behavior. Indeed, it could not have succeeded there because of a massive denial that a problem really existed. In a series of policy papers prepared for President Johnson and then President Nixon, I began to argue, for example, that the decline of the two-parent family was an emerging problem. Both presidents were receptive. But their attempts to confront the problem never survived the fierce criticism that they evoked; after a while the subject was more or less banished from public discourse.

Poverty and family structure

A recent Census Bureau publication, reflecting the Bureau's innovative effort to improve poverty statistics by counting tax benefits and government transfer payments (both cash and in-kind) as well as income, summarizes the quarter-century aftermath:

> The data show clearly that the effect of government transfers on the poverty status of persons 65 years and over is very large compared to the effect of such transfers on the poverty status of young persons. The percent of older persons (65 years and over) in poverty was 47.5 percent before government transfers were added to the income definition. The addition of nonmeans-tested cash transfers (primarily Social Security) reduced the rate to 14.0 percent and the addition of other government transfers brought the rate to 9.0 percent. The total effect of adding government transfers was to reduce the poverty rate of older persons by 81.1 percent. Among those under 18 years of age, the before-transfer poverty rate was 24.0 percent and the addition of all government transfers brought the rate to 17.1 percent. The effect of government transfers was to reduce the poverty rate of young persons by 28.8 percent.

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In other words, the social-welfare system enacted in this century has all but eliminated poverty among the aged, but has had much less effect on children, leaving high rates of poverty at any one time, and horrendous rates *over* time.

Family structure is the principal correlate of child poverty. As demographers repeat, children in single-parent families are poor, and there are more and more of them. Thus Sandra Hofferth projects that relatively few children born in 1980 will live to age seventeen with both natural parents. For white children the likelihood of living with both parents fell from 81 percent for those born in the early 1950s to 30 percent for those born in 1980. For black children it dropped from 52 to 6 percent over the same period.

Many of these children will at some time in their youth live in single-parent families. According to Hofferth, white children born in 1980 can expect to spend a third of their childhood years in single-parent households; black children can expect to spend over half of their youth with only one parent. There has, moreover, been a huge transformation in just one generation: the corresponding proportions for the early 1950s were less than a tenth for white children, and less than a quarter for black youngsters.

As for marriage, divorce rates appear to have stabilized, but at an unprecedented level. Teresa Castro Martin and Larry L. Bumpass conclude that "about two thirds of all first marriages are now likely to disrupt." Almost a quarter of first marriages will end within five years.

A growing number of children—now almost one in four—are born to unmarried women. The increase in illegitimacy has been striking. In 1951 the illegitimacy rate among whites was 1.6 percent; by 1986 it had reached 15.7 percent. More extensive historical series are for some reason still hard to come by, but there can be little doubt of the trend. In 1909 W.E.B. DuBois recorded the percentage of illegitimate births among blacks in Washington, D.C., for the years 1870 through 1907; it began at 19 and ended at 21. In 1986 it was 68 percent; in Baltimore it has reached 80 percent. Among blacks nationwide the rate is 61.2 percent.

Family structure need not be a principal correlate of child poverty. Wealth and income can accrue in other ways than they now do, but *as* they now do, single-parent families suffer. Children in female-headed households have a poverty rate of 55 percent. This is five times the poverty rate of children in families that are not headed by single mothers.

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Robert D. Reischauer at the Congressional Budget Office has been sorting out income distribution by age and family composition since 1973, when the great postwar boom came to an end. His striking conclusions demonstrate that we are becoming more unequal: "The average adjusted family income of people in the bottom fifth—or quintile—of the population was 11 percent lower in 1987 than for their counterparts in 1973, while that of the top fifth was 24 percent higher."

Single mothers with children fared the worst. People in the two lowest quintiles of single-mother families in 1987 had average family incomes 21 percent and 15 percent lower than their counterparts fourteen years earlier.[2] An index of Aid to Families with Dependent Children (AFDC) payments in this period fell roughly 25 percent in real terms.

Young people generally are falling behind. As Reischauer notes, in the period since 1973 "[t]he median dollar income of full-time, year-round workers remained the same or actually fell in real terms for groups age 35 and under, but rose for older ones." The economic difficulties of young Americans appear to be related to the rise of post-marital society, which began just about thirty-five years ago. To explore this connection, we must consider whether behavioral differences between groups are increasing inequality.

Relevant data are provided by Reynolds Farley, who has computed the differences between various ethnic groups in New York State; to say the least, they are suggestive. Thus in 1988 Asians had the highest proportion of children (83 percent) in husband-wife families, and Puerto Ricans had the lowest (35 percent); per capita income for Asian children in New York in 1988 was just under $12,000, whereas the figure for Puerto Rican children was just under $4,000. Very little that is external can account for these differences; surely they reflect elective differences in individual and group behavior. These differences will pass on to future generations in the form of personal capital and wealth.

From a one-time Census study, *Household Wealth and Asset Ownership: 1984*, we know that the median net worth of all households with incomes under $11,000 was $5,080. Gordon Green of the Census Bureau finds that black female heads of households with incomes under $11,000 have a median net worth of negative $18.

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[2]The lowest quintile of married couples with children also lost income in these years. Perhaps a post-marital society fails to reward childbearing of any sort.

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The zero net worth of low-income female-headed families is not surprising. Their principal source of income is public assistance—which, as of old, requires the recipients to be paupers. (We no longer speak of pauperism, but paupers still exist.) In 1981 I estimated that 32 percent of children born in the previous year would receive Aid to Families with Dependent Children (AFDC) benefits before reaching age eighteen. This projection appears to be holding up. In 1989 the Census Bureau used data from the Survey of Income and Program Participation to examine people's use of the welfare system over a period of thirty-two months. Nearly one-fifth of the sample "participated" in at least one of the major assistance programs. Nearly half the nation's blacks and just over one-third of its Hispanics received assistance during the period. By far the greatest incidence and duration of dependency were found in female-headed households and among very young children; 30 percent of children under six were on welfare at some point in the period. That these are the ratios over just thirty-two months suggests how likely dependence is at some time over the course of eighteen years.

A test of my proposition will be the change, if any, in intergenerational transfers of capital. There seems little doubt that the share of total wealth at the top of the heap has diminished; the top one-half of one percent now owns only a little more than a quarter of the wealth. This fact seems to jibe with the lessened concentration of ownership of physical capital. The issue now to be resolved is whether family structure skews the transfer of human capital in such a way that wealth concentrates in the middle to the detriment of both extremes, with the lowest group ever more isolated.

In sum, family structure may now be the principal determinant of class structure. Able scholars are now testing this proposition, and while they have found evidence of intergenerational transmission of poverty and dependency, it is not as yet overwhelming. Then again, we have only just entered this period of social history; half a century may be needed to sort things out.

The new social condition

One thing, however, is already clear: we *have* entered a new social condition. I put the case in 1986 that "in many if not most of our major cities we are facing something like social regression."

And we are facing it alone. For most of the twentieth century, the social problems that beset the United States—always excluding

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that of race—appeared first in Europe, as did the first responses. With a one- or two-generation lag, we adopted those responses here: workman's compensation, unemployment insurance, social security, medical care, and the like. (Although we lack universal health insurance, public spending on health care is huge.) But now we have a new set of problems, and there is no "European" solution at hand.[3] So we are going to have to work our own way through these issues. It does not follow that we will, but we must.

It is obvious that American society rewards traditional family patterns, and punishes those that in the past would have been called deviant. What is less obvious is why this fact is so obscure to so many. The disjunction between our norms and our behavior is dysfunctional in the extreme.

Substance abuse is equally dysfunctional, and it would be helpful to know in what ways the epidemic spread of crack use is associated with family structure. It is evident that crack use is heaviest in areas in which single-parent families are concentrated. Is there an analogy with the spread of infectious disease in nineteenth-century slums? Crack first appeared in the Bahamas in 1983. By 1985 it had reached New York City and soon affected more than 10 percent of the population, concentrated in obvious places. Crack cocaine, moreover, unlike earlier hard drugs, seems to be used equally by males and females. Just as heroin in the 1960s contributed to the rise of the single-parent family, so will crack soon give us the no-parent child as a social problem.

We are likely to respond to this development by re-establishing orphanages. Most orphanages in the United States were founded in response to epidemics (yellow fever, malaria, cholera) or wars (primarily the Civil War). Orphanages were a humane development in their day, but they are now mostly gone, replaced by foster care—a federal program comparable to AFDC. But now that drug addiction has become epidemic in certain portions of the population, present arrangements may not suffice to get us through the emerging crisis.

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[3]The Luxembourg Income Study data indicate that, like the United States, Canada and Sweden also have more children than elderly people in poverty. (Sweden, however, has no poverty among the aged and virtually none among children.) So it is possible that a more universal, post-industrial pattern is emerging. Mature social-insurance systems gradually eliminate poverty among the aged; but at the same time, marital instability and tenuous labor markets may leave a fair number of poor children even in prosperous countries.

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It would be cheering to conclude with a catalog of further specifics, but I forbear for want of inspiration. I do not know what to do, especially in a political setting in which many deny that much needs doing. James S. Coleman believes that we must work with families as they are. But such a proposition requires assent before it can have consequences.

There are also some new variables at work. By the end of the century immigration will account for a third of our population increase; this is just below the ratio (39.6 percent) for the first decade of the century. This may or may not slow down present trends; we simply do not know.

The recently concluded 100th Congress did begin to respond to our new social condition by enacting two major bills: the Family Support Act of 1988 was the first redefinition of the purposes and expectations of the welfare system since the system began as a temporary widows' pension in 1935; and for the first time in the war on drugs (begun by Theodore Roosevelt in 1907), the Anti-Drug Abuse Act of 1988 addressed the issue of substance abuse by stressing treatment and demand reduction.

Our difficulty is that the federal executive branch currently lacks the institutional capacity fully to implement either of these new laws. Worse, there is no great popular enthusiasm for them. Editorial comment was lukewarm at best; subsequent commentary has generally been negative, while advocacy groups have on the whole been hostile or indifferent. (State governments, however, have greeted the laws with enthusiasm.) Still, Congress did summon up the energy and the insight to enact them. If we want to believe that nothing happened with the passage of these laws, then nothing will, and we will not try again for another generation. But that need not be the outcome.

Drug abuse and welfare dependency are not American society's only flaws, of course. In the 1980s the federal government's fiscal policies were wildly irresponsible. In eight years of peace we increased the national debt by an amount nearly equal to that which was incurred in World War II. In the course of doing so, we ended up a debtor nation, with nothing like our post-1945 capacity to retire the debt and resume a strong path of saving and investment directed to future growth. Without such growth, of course, we cannot finance policies to improve our new social condition.

In the 1988 Taubman Lecture at Brown University, Frank Levy observed that there are all too many parallels between the level of

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national savings and the current condition of children—our provisions for the future. Levy insisted that we will need prudent and compassionate principles to guide our behavior, because simple cost-benefit calculations at the individual level will not solve our problems. Still, we are surely a nation in which such principles can be found. A tough-minded approach to post-industrial social issues may lead to the coming of age of American social policy.

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The impact of inner-city crime

JOHN J. DiIULIO, JR.

My grandmother, an Italian immigrant, lived in the same Philadelphia row house from 1921 till her death in 1986. When she moved there, and for the four decades thereafter, most of her neighbors were Irish and Italian. When she died, virtually all of her neighbors were black. Like the whites who fled, the first blacks who moved in were mostly working-class people living just above the poverty line.

Until around 1970, the neighborhood changed little. The houses were well-maintained. The children played in the streets and were polite. The teenagers hung out on the street corners in the evenings, sometimes doing mischief, but rarely—if ever—doing anything worse. The local grocers and other small businesspeople (both blacks and the few remaining whites) stayed open well past dark. Day or night, my grandmother journeyed the streets just as she had during the days of the Great Depression, taking the bus to visit her friends and relatives, going shopping, attending church, and so on.

She was a conspicuous and popular figure in this black community. She was conspicuous for her race, accent, and advanced age;

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she was popular for the homespun advice (and home-baked goods) she dispensed freely to the teenagers hanging out on the corners, to the youngsters playing ball in the street in front of her house, and to their parents (many of them mothers living without a husband).

Like the generations of ethnics who had lived there before them, these people were near the bottom of the socioeconomic ladder. I often heard my grandmother say that her new neighbors were "just like us," by which she meant that they were honest, decent, law-abiding people working hard to advance themselves and to make a better life for their children.

But in the early 1970s, the neighborhood began to change. Some, though by no means all, of the black families my grandmother had come to know moved out of the neighborhood. The new neighbors kept to themselves. The exteriors of the houses started to look ratty. The streets grew dirty. The grocery and variety stores closed or did business only during daylight hours. The children played in the schoolyard but not in front of their homes. The teenagers on the corners were replaced by adult drug dealers and their "runners." Vandalism and graffiti became commonplace. My grandmother was mugged twice, both times by black teenagers; once she was severely beaten in broad daylight.

In the few years before she died at age eighty-four, and after years of pleading by her children and dozens of grandchildren, she stopped going out and kept her doors and windows locked at all times. On drives to visit her, when I got within four blocks of her home, I instinctively checked to make sure that my car doors were locked. Her house, where I myself had been raised, was in a "bad neighborhood," and it did not make sense to take any chances. I have not returned to the area since the day of her funeral.

My old ethnic and ghetto neighborhood had become an underclass neighborhood. Why is it that most readers of this article avoid, and advise their friends and relatives to avoid, walking or driving through such neighborhoods? Obviously we are not worried about being infected somehow by the extremely high levels of poverty, joblessness, illiteracy, welfare dependency, or drug abuse that characterize these places. Instead we shun these places because we suppose them to contain exceedingly high numbers of predatory street criminals, who hit, rape, rob, deal drugs, burglarize, and murder.

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This supposition is absolutely correct. The underclass problem, contrary to the leading academic and journalistic understandings, is mainly a crime problem. It is a crime problem, moreover, that can be reduced dramatically (although not eliminated) with the human and financial resources already at hand.

Only two things are required: common sense and compassion. Once we understand the underclass problem as a crime problem, neither of those two qualities should be scarce. Until we understand the underclass problem as a crime problem, policymakers and others will continue to fiddle while the underclass ghettos of Philadelphia, Newark, Chicago, Los Angeles, Miami, Washington, D.C., and other cities burn.

Essentially, there are two ways of thinking about the underclass problem that we must reconsider before progress can be made.

Blaming the victimizers

First, there are the "culture of poverty" ideas advanced mainly by conservatives and neoconservatives. The conservative idea was articulated powerfully by Edward Banfield in his book *The Unheavenly City: The Nature and Future of Our Urban Crisis* (1968). The neoconservative idea was captured nicely in a recent American Enterprise Institute volume edited by Michael Novak, *A Community of Self-Reliance: The New Consensus on Family and Welfare* (1987).

Banfield argued that the lot of America's impoverished urban dwellers was due mainly to their own ways of thinking and behaving. These individuals, he suggested, simply lacked the middle-class ethos of hard work, education, good personal hygiene, strong family life, saving for a rainy day, and so on. Ghettos were ghettos because they were populated by impulsive, foul-mouthed, aggressive, uneducated, oversexed, and crime-prone males, and by females who shared many of these characteristics and who imparted them to their illegitimate offspring. Young men in these areas, he observed, rioted mainly "for fun and profit."

So long as this culture of poverty persisted, Banfield concluded, the nation's poor inner cities would remain "unheavenly" places; furthermore, there was virtually nothing that government could do to change things for the better, and most efforts to "do good" would probably only make things worse.

The neoconservative view differs from Banfield's in two important respects. First, unlike Banfield and other traditional con-

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servatives, Novak and his neoconservative colleagues have not been content to diagnose the problem without offering prescriptions for government action; and second, while critical of the way that social-welfare measures such as Aid to Families with Dependent Children have been devised and implemented, they have not opposed such measures in principle.

But neoconservatives are as one with their traditional conservative brethren in the belief that, fundamentally, the underclass problem is synonymous with the behavioral and attitudinal pathologies of today's ghetto dwellers. Marrying this belief to their support for certain types of government-sponsored social-welfare measures, they have championed work-based welfare-reform initiatives such as New Jersey's Realizing Economic Achievement (REACH) program, and the federal welfare-reform legislation modeled largely on REACH that was signed into law last year.

The neoconservatives have thus seen the underclass problem mainly as a social-welfare problem. Essentially, the "new consensus" on this problem is that, rather than simply forking over money to largely female-headed households in distressed inner cities, government should enter into mandatory "contracts" with welfare recipients. The recipients agree to find a job or enroll in remedial classes; the government agrees to provide job training, day care, and other services that may ease their transition to economic self-sufficiency and (or so the argument goes) enhanced self-esteem.

Neoconservatives argue that the "contracts" must be mandatory because, though welfare recipients are not by nature stupid, lazy, or criminal, their miserable circumstances have rendered them incapable of thinking and acting on their own in ways that would enable them to free themselves and their children from the assorted shackles and seductions of no-strings-attached government largesse. In other words, these poor people have not been socialized into middle-class norms of education, work, and family responsibility; mandatory participation in the programs is necessary to habituate them to these norms. The neoconservative hope is that through such welfare reforms, welfare-dependent wretches may be transformed into solid citizens and taxpayers, thereby destroying the culture of poverty and liberating the underclass to evolve into some sort of working class.

There are two things wrong with culture-of-poverty notions, old and new: first, they are probably false, and second, to the extent that they are true they are misleading.

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There is little convincing research to document the view that most of the impoverished citizens in distressed urban areas harbor fundamentally different attitudes toward work and family than the rest of us. Even if such research existed, social psychologists have known for years that the links between attitudes and behavior are much weaker than is commonly supposed. White cops with deeply racist attitudes, for instance, are as likely as non-racist ones to handle minority suspects "by the book."

Purely for the sake of argument, however, let me concede that underclass citizens think and behave differently from earlier generations of ghetto dwellers, from working-class ethnics, and from most middle- and upper-class commentators on their situation: they are more destructive of themselves and others, less inclined to seek and keep jobs, less willing to study conscientiously, less able to defer gratification, less family-oriented, and so on. I would explain their "culture of poverty" in the same way that I would explain any other culture: as a reflection of the incentives that shape the everyday decisions of a majority of its members.

In the early 1980s many conservatives cried that corporate managers were not investing as much as they should because government regulatory and tax policies were perverse. Why should businesspeople invest that extra dollar if government was effectively "mugging" them for it? Nobody hinted about a "culture of underinvestment." Instead, conservatives called for (and won) changes in the policies that allegedly discouraged investment.

What is good for the corporate goose should be good for the underclass gander. When underclass citizens do not bother to make that extra (or perhaps first) dollar, it is because they quite literally have reason to fear getting mugged for it. And when they display cavalier and callous attitudes toward even their friends and relatives, it is because they live in an environment in which any display of "normal" middle-class sensibilities may make one a target of street-level predators who truly do think and behave differently than the rest of us.

Both the old and the new culture-of-poverty ideas shield us from an unpleasant fact: the essential difference between us and the overwhelmingly decent and law-abiding people who reside in these urban neighborhoods is that we can avoid what they cannot escape; we can drive quickly past the crime-torn streets where they must walk, live, and cope. The gap between us and the underclass can be measured not only in terms of values or incomes but also in

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terms of rational expectations about the probability of being victimized by criminals.

It would be wrong, however, to imply that the culture-of-poverty theorists have completely ignored this dimension of the problem. Banfield devoted much of one chapter and parts of several others to a discussion of urban crime. And near the end of their volume, Novak and his colleagues briefly acknowledge the destructive role that criminals play in contemporary ghetto neighborhoods.

But neither the conservatives nor the neoconservatives have distinguished carefully between the behavioral and attitudinal characteristics of typical underclass citizens, on the one hand, and those of the criminals who live among these citizens, on the other. To the extent that culture-of-poverty notions apply at all, they apply only to the latter—the "underside of the underclass." In failing to make this distinction, culture-of-poverty theorists blame the victims along with the victimizers.

The truly deviant

Liberals have tended to reject culture-of-poverty explanations of the underclass problem.[1] Instead, they have understood the worsening of ghetto conditions mainly as the by-product of a complex process of economic and social change. One of the latest and most influential statements of this view is William Julius Wilson's *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* (1987).

Wilson argues that over the last two decades a new and socially destructive class structure has emerged in the ghetto. As he sees it, the main culprit is deindustrialization. As plants have closed, urban areas, especially black urban areas, have lost entry-level jobs. To survive economically, or to enjoy their material success, ghetto residents in a position to do so have moved out, leaving behind them an immobilized "underclass."

As Wilson describes it, this underclass is economically isolated and politically powerless. Ghetto neighborhoods that once had a modicum of social stability and economic vitality have been transformed into pockets of abject poverty and welfare dependency. As their material circumstances have worsened, and as they have lost

[1]Two interesting exceptions are Christopher Jencks, "Deadly Neighborhoods," *The New Republic*, June 13, 1988, pp. 23-32; and Orlando Patterson, "The Moral Crisis of the Black American," *The Public Interest*, No. 23 (Summer 1973), pp. 43-69.

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almost all contact with public and private institutions that promote adherence to middle-class values and behaviors, the typical residents of these neighborhoods—whom Wilson calls "the truly disadvantaged"—have come to think and act in "deviant" ways that deepen their isolation: they do not form intact families and nurture their children, they do not demand orderly schools that educate their children, they do not seek jobs, they do not resist the blandishments of drugs.

Wilson's main prescription is what he calls a "Universal Reform Package." This "package" contains macroeconomic policies that, in his estimation, will revitalize inner-city economies and thereby reverse the downward social spiral of their underclass residents. The flight of jobs caused the problem; the return of jobs will ameliorate or solve it. Run the economic transformation in reverse, he implies, and a cure can be found for the social pathologies that emerged from it.

Wilson's analysis of the underclass problem has been highly praised by scholars, policymakers, journalists, and activists—most of them liberals, but many of them neoconservatives. Liberals have applauded his explicit rejection of culture-of-poverty notions, a rejection that Wilson took pains to restate and clarify in his 1988 Godkin lecture at Harvard University. But as Mark Alan Hughes has suggested, Wilson's rejection of these notions is more apparent than real.

In effect, Wilson blames changing socioeconomic forces for contemporary ghetto dwellers' attitudinal and behavioral "pathologies," which is another way of saying "the culture of poverty." He differs from Banfield, Novak, and other analysts on the right mainly in that he locates the source of these pathologies in economic trends that he thinks are partially reversible, but over which ghetto dwellers have no real control. Thus, liberals are satisfied that he avoids "blaming the victims"; meanwhile, many neoconservatives can applaud his "unblinking" understanding of the underclass problem.

Both in *The Truly Disadvantaged* and elsewhere, Wilson shows a more profound awareness of the criminal-justice component of the underclass problem than do card-carrying culture-of-poverty theorists. Still, he has relatively little to say about the role that criminals play in fostering and perpetuating the underclass problem. Like conservative and neoconservative analysts, moreover, he distinguishes weakly between underclass victims and criminal victim-

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izers. While he concedes that "long-term welfare families and street criminals are distinct groups," he treats them together as members of the "underclass," and he offers no package of law-enforcement or correctional policies to complement his package of macroeconomic reforms.

Wilson has focused our attention on the socioeconomic straits of the truly disadvantaged with an elegance and rhetorical force that is truly admirable.[2] But despite its many strengths, his often subtle analysis of the underclass problem wrongly deemphasizes one obvious possibility: "The truly disadvantaged" exist mainly because of the activities of "the truly deviant"—the large numbers of chronic and predatory street criminals—in their midst. One in every nine adult black males in this country is under some form of correctional supervision (prison, jail, probation, or parole).[3] Criminals come disproportionately from underclass neighborhoods. They victimize their neighbors directly through crime, and indirectly by creating or worsening the multiple social and economic ills that define the sad lot of today's ghetto dwellers.

Predatory ghetto criminals

I propose a third way of thinking about the underclass problem. The members of the underclass are, overwhelmingly, decent and law-abiding residents of America's most distressed inner cities. Fundamentally, what makes them different from the rest of us is not only their higher than normal levels of welfare dependency and the like, but their far higher than normal levels of victimization by predatory criminals.

This victimization by criminals takes several forms. There is *direct victimization*—being mugged, raped, or murdered; being threatened and extorted; living in fear about whether you can send your children to school or let them go out and play without their being bothered by dope dealers, pressured by gang members, or

[2]In addition, he has canvassed competing academic perspectives on the underclass; see William Julius Wilson, ed., "The Ghetto Underclass: Social Science Perspectives," *Annals of the American Academy of Political and Social Science* (January 1989). It should also be noted that he is directing a $2.7 million research project on poverty in Chicago that promises to be the most comprehensive study of its kind yet undertaken.

[3]According to the Bureau of Justice Statistics, in 1986 there were 234,430 adult black males in prison, 101,000 in jail, an estimated 512,000 on probation, and 133,300 on parole. There were 8,985,000 adult black males in the national residential population. I am grateful to Larry Greenfeld for his assistance in compiling these figures.

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even struck by a stray bullet. And there is *indirect victimization*—dampened neighborhood economic development, loss of a sizable fraction of the neighborhood's male population to prison or jail, the undue influence on young people exercised by criminal "role models" like the cash-rich drug lords who rule the streets, and so on.

Baldly stated, my hypothesis is that this victimization causes and perpetuates the other ills of our underclass neighborhoods. Schools in these neighborhoods are unable to function effectively because of their disorderly atmosphere and because of the violent behavior of the criminals (especially gang members) who hang around their classrooms. The truly deviant are responsible for a high percentage of teen pregnancies, rapes, and sexual assaults. Similarly, many of the chronically welfare-dependent, female-headed households in these neighborhoods owe their plights to the fact that the men involved are either unable (because they are under some form of correctional supervision) or unwilling (because it does not jibe well with their criminal lifestyles) to seek and secure gainful employment and live with their families. And much of the poverty and joblessness in these neighborhoods can be laid at the door of criminals whose presence deters local business activity, including the development of residential real estate.

Blacks are victims of violent crimes at much higher rates than whites. Most lone-offender crime against blacks is committed by blacks, while most such crimes against whites are committed by whites; in 1986, for instance, 83.5 percent of violent crimes against blacks were committed by blacks, while 80.3 percent of violent crimes against whites were committed by whites. This monochrome picture of victim-offender relationships also holds for multiple-offender crimes. In 1986, for example, 79.6 percent of multiple-offender violent crimes against blacks were committed by blacks; the "white-on-white" figure was 59.4 percent.

Criminals are most likely to commit crimes against people of their own race. The main reason is presumably their physical proximity to potential victims. If so, then it is not hard to understand why underclass neighborhoods, which have more than their share of would-be criminals, have more than their share of crime.

Prison is the most costly form of correctional supervision, and it is normally reserved for the most dangerous felons—violent or repeat offenders. Most of my readers do not personally know anyone in prison; most ghetto dwellers of a decade or two ago probably

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would not have known anyone in prison either. But most of today's underclass citizens do; the convicted felons were their relatives and neighbors—and often their victimizers.

For example, in 1980 Newark was the street-crime capital of New Jersey. In the Newark area, there were more than 920 violent crimes (murders, non-negligent manslaughters, forcible rapes, robberies, and aggravated assaults) per 100,000 residents; in the rest of the state the figure was under 500, and in affluent towns like Princeton it was virtually nil. In the same year, New Jersey prisons held 5,866 criminals, 2,697 of them from the Newark area.[4] In virtually all of the most distressed parts of this distressed city, at least one of every two hundred residents was an imprisoned felon.[5] The same basic picture holds for other big cities.[6]

Correlation, however, is not causation, and we could extend and refine this sort of crude, exploratory analysis of the relationship between crime rates, concentrations of correctional supervisees, and the underclass neighborhoods from which they disproportionately come. But except to satisfy curiosity, I see no commanding need for such studies. For much the same picture emerges from the anecdotal accounts of people who have actually spent years wrestling with—as opposed to merely researching—the problem.

For example, in 1988 the nation's capital became its murder capital. Washington, D.C., had 372 killings, 82 percent of them committed on the streets by young black males against other young black males. The city vied with Detroit for the highest juvenile homicide rate in America. Here is part of the eloquent testimony on this development given by Isaac Fulwood, a native Washingtonian and the city's police-chief designate:

[4]I am grateful to Hank Pierre, Stan Repko, and Commissioner William H. Fauver of the New Jersey Department of Corrections for granting me access to these figures and to related data on density of prisoner residence; to Andy Ripps for his heroic efforts in organizing them; and to my Princeton colleague Mark Alan Hughes for his expert help in analyzing the data.

[5]Ten of the thirteen most distressed Newark census tracts were places where the density of prisoner residence was that high. In other words, 76.9 percent of the worst underclass areas of Newark had such extremely high concentrations of hardcore offenders. In most of the rest of Newark, and throughout the rest of the state, such concentrations were virtually nonexistent.

[6]In 1980 in the Chicago area, for example, in 182 of the 1,521 census tracts at least one of every two hundred residents was an imprisoned felon. Fully twenty of the thirty-five worst underclass tracts had such extraordinary concentrations of serious criminals; in several of them, more than one of every hundred residents was behind prison bars. I am grateful to Wayne Carroll and Commissioner Michael Lane of the Illinois Department of Corrections for helping me with these data.

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> The murder statistics don't capture what these people are doing. We've had in excess of 1,260 drug-related shootings.... People are scared of these kids. Someone can get shot in broad daylight, and nobody saw anything.... Nobody talks. And that's so different from the way it was in my childhood.

The same thing can be said about the underclass neighborhoods of other major cities. In Detroit, for instance, most of the hundreds of ghetto residents murdered over the last six years were killed within blocks of their homes by their truly deviant neighbors.

To devise meaningful law-enforcement and correctional responses to the underclass problem, we need to understand why concentrations of crime and criminals are so high in these neighborhoods, and to change our government's criminal-justice policies and practices accordingly.

Understanding the problem

We begin with a chicken-and-egg question: Does urban decay cause crime, or does crime cause urban decay?

In conventional criminology, which derives mainly from sociology, ghettos are portrayed as "breeding grounds" for predatory street crime. Poverty, joblessness, broken homes, single-parent families, and similar factors are identified as the "underlying causes" of crime.[7] These conditions cause crime, the argument goes; as they worsen—as the ghetto community becomes the underclass neighborhood—crime worsens. This remains the dominant academic perspective on the subject, one that is shared implicitly by most public officials who are close to the problem.

Beginning in the mid-1970s, however, a number of influential studies appeared that challenged this conventional criminological wisdom.[8] Almost without exception, these studies have cast grave doubts on the classic sociological explanation of crime, suggesting that the actual relationships between such variables as poverty, illiteracy, and unemployment, on the one hand, and criminality, on the other, are far more ambiguous than most analysts freely assumed only a decade or so ago.

[7]For example, see the classic statement by Edwin H. Sutherland and Donald R. Cressey, *Principles of Criminology*, 7th rev. ed. (Philadelphia: J.P. Lippincott, 1966).

[8]See for example James Q. Wilson, *Thinking About Crime* (New York: Basic Books, 1975), especially the third chapter.

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Deriving their perspective largely from basic economics, many leading criminologists now argue that most predatory street criminals, like most of the rest of us most of the time, are best understood as rational, self-interested actors out to maximize their personal satisfaction. If crime pays, then many crimes will be committed; if the perceived penalties for crime are swift, certain, and severe, then fewer crimes will be committed. From this perspective, the typical predatory street criminal is seen as a calculating opportunist who prefers an "easy mark."

One does not have to accept this theory wholesale (I certainly do not) to recognize that the residents of underclass neighborhoods are easy marks *par excellence*. They are stationary, isolated targets for predatory street criminals.

The typical underclass neighborhood is a place of run-down parks and poorly lit streets. It is a place teeming with abandoned houses and high-rise slum apartments where locks are broken or nonexistent. It is a place where the only types of "private security" that frightened homeowners can afford are a baseball bat next to the bed and a tire iron under the seat of the car. It is a place where children walk to school through a maze of brazen drug dealers, and where owners of small shops keep guns beneath cash registers and close early on nights when they sense trouble. In short, it is a place hospitable to predatory street criminals. For the truly deviant, there is no place like home.

The criminal-justice machinery designed to handle these criminals is inadequate at best, and a part of the problem at worst. Police patrols of underclass neighborhoods are universally thin, and in some places virtually nonexistent.

Washington, D.C., for example, had 3,855 police officers in 1988 to cover sixty-eight square miles, scores of underclass neighborhoods, and about one hundred open-air drug markets. Meanwhile, there were 1,200 Capitol Police to cover just Capitol Hill. And in the summer months, while yuppie havens like Georgetown had extra police working overtime to handle crowds of vacationing college kids, there were too few police to respond fully to violent incidents in underclass areas.

Policing, however is only one part, and probably not the largest part, of the criminal-justice dilemma facing underclass neighborhoods. Correctional officials deal mainly with people who have been arrested or convicted. Over three-quarters of the nearly 3.5 million people under correctional supervision in this country are

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not incarcerated. They are in their communities, usually in the very neighborhoods where they committed their last crimes. Correctional authorities maintain virtually no direct supervision of probationers and parolees in these jurisdictions. The case load of an average inner-city "field services" (probation or parole) worker is between 200 and 300. At best, supervision amounts to one phone call a month.

Not surprisingly, therefore, a study showed that almost 70 percent of young adults who had been paroled from prisons in twenty-two states were rearrested for serious crimes one or more times within six years; 53 percent of all parolees were convicted of a serious new offense, and 49 percent were sent back to prison. Those paroled from prison for a property crime were as likely as those paroled for a violent crime to be rearrested for a violent crime.

And here is the rub: by and large, when the truly deviant circulate through the correctional system and return to crime, their brand new victims are their same old underclass neighbors. According to Washington's Chief Fulwood, it is not uncommon for police to arrest the same person eight or nine times in the same ghetto neighborhood in the space of a few weeks. In Philadelphia and other big cities, jails have become "revolving doors" that permit drug lords to be incarcerated one day and to return to the streets the next.

An underclass success story

Despite being victimized by the criminals in their midst, and by a criminal-justice system that generally does little to protect them from these criminals, residents of many underclass neighborhoods have managed to improve their lot. One of the most instructive examples is a public-housing development in the Kenilworth-Parkside area of Washington, D.C.

Just a few years ago, the development was racked by crime; it was the site of one of the District's largest open-air drug markets. Most of the development's residents were single women with children, and over 80 percent of them were on welfare. Residents once lived for three years without heat and hot water.

In 1982 a tenant committee led by Kenilworth-Parkside resident Kimi Gray formed a tenant-management corporation and assumed control of the 464-unit low-rise project. Over the next five years, the tenant managers collected rents, enforced school attendance, started community-based businesses, and funded college

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educations for community residents who agreed to return home to apply what they learned.

Those in search of rebuttals to culture-of-poverty notions as well as to the idea that the "underclass" has to be forced to help itself need only consider Gray and her fellow tenants. The results of their tireless efforts to improve their community have been remarkable. Rent receipts have increased over 70 percent; welfare dependency has dropped from 85 percent to 35 percent.

In October 1988 the residents of Kenilworth-Parkside signed a contract to purchase the project from the District. Residents have five years to buy their homes from the tenant corporation. Renovation of the development's housing stock is well under way. Kenilworth-Parkside will also soon be the scene of a reverse commuting program that will take its residents to jobs in Northern Virginia.

This success story may have important repercussions for American housing policy. As a congressman, Jack Kemp strongly supported the Kenilworth-Parkside effort; as Secretary of Housing and Urban Development, he is now working to further the tenant-management approach around the country.

But the first chapter of the success story is local and concerns ridding the area of predatory criminals. As both the District police and the residents are quick to point out, none of these improvements would have been possible if the area had remained the province of drug dealers, youth gangs, and street toughs. Central to the self-help strategy was Gray's effort to form more constructive community relations with the District police. Resident crime-watch groups and "town meetings" assisted police in disrupting the drug traffickers, arresting and convicting the violent thugs, and deterring would-be burglars and other criminals from preying upon the development's residents.

Successful examples like this are few, but that may be because serious efforts to solve the problem have been few as well.

Solving the problem

Even if readers are not persuaded by my claim that the underclass problem is primarily caused by crime, and even if they think that I have unfairly criticized eminent analysts of the problem, I hope that they agree at least that crime in inner cities is a terrible problem in need of a solution in its own right, and a part of the underclass problem that demands more serious thought and

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practical-minded attention than it has yet received. In addition, they should consider four propositions:

1. Underclass neighborhoods are home to a disproportionate number of criminal offenders and people under correctional supervision.

2. These criminals repeatedly victimize their overwhelmingly law-abiding neighbors, most of whom, like the offenders themselves, are poor and black.

3. As most police and correctional administrators are the first to admit, current criminal-justice measures are inadequate to meet the challenges posed by these offenders.

4. Whatever good social welfare or other measures may do in addressing the underclass problem, that good will be limited significantly unless the crime problem in these neighborhoods is addressed better than it has been.

As Richard P. Nathan has persuasively argued, thinking hard about the underclass means thinking through institutional reforms in schools, welfare agencies, and (last but not least) criminal-justice agencies that might actually improve the quality of life in underclass neighborhoods. Those closest to the problem understand that improving the response of criminal-justice agencies is the *sine qua non* of progress on the other fronts. As Chief Fulwood observed, "The government has to provide public safety. You have to get people to believe that they can go about their jobs, schooling, recreation, and whatnot. If the government doesn't do that much, the rest is hopeless; it has failed, and failed miserably."

I propose a three-pronged strategy for solving the problem of crime and the underclass.

The first prong is *more intensive community-style policing*. Although some widely cited studies suggest that increasing the number of police on patrol in a given area has little or no impact on crime rates, such studies do not adequately weigh the quality of policing services. We would not be surprised to learn that simply increasing the number of violinists in an orchestra does not automatically improve the music's sound. By the same token, it should come as no surprise to learn that simply putting more cops on the streets has no discernible impact on crime rates.

But the quality of the patrols, independent of "force levels," may vitally affect how safe citizens are and how safe they feel. The quality of policing services depends on such things as the nature of the department's command-and-control structures, the

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length and types of training received by the typical officer, and the nature of the standard routines for deploying manpower.

There are two basic types of police organizations, "traditional" and "community-style." In traditional "clean sweep" operations, scores of officers are redeployed to trouble spots for a few days or weeks, and make hundreds or thousands of arrests. In some places (e.g., Washington, D.C.), such operations have been run on a regular basis; in other cities (e.g., New York and Miami), they have occurred on more of an *ad hoc* basis in the wake of riots or in response to political pressures.

It is not clear, however, that these measures have brought more than temporary relief to underclass ghettos. Certainly, they are no substitute for more intensive community-style policing of these neighborhoods. In contrast to traditional policing, community-style policing stresses proactive patrolling instead of emergency responses; community participation in the planning of police operations; the use of small "quality circle" management teams that cut across ranks (captains sit with junior officers) and functional specialties (plainclothes vice officers work with uniformed officers); and related features designed to get officers out of their patrol cars and into direct and personal communications with community residents. Studies that weigh such management factors indicate that both the quantity and the quality of patrols probably can make a difference, especially in high-crime neighborhoods.

More intensive community-style policing of underclass neighborhoods is needed to protect the lives and property of the people who live in them. In Washington, D.C., Detroit, Houston, Philadelphia, Oakland, Los Angeles, New York City, Seattle, and other cities, several steps in this direction have already been taken. But further steps are required.

The second prong of the strategy is *more intensive community-based correctional supervision programs*. As I noted above, conventional probation and parole programs involve little direct supervision of offenders, who are left pretty much to their own devices. Overcrowding behind bars has not prevented overloading on the streets, and underclass neighborhoods are home to a startling number of convicted criminals.

Over the last several years, Georgia, New Jersey, and many other jurisdictions have begun to experiment with community-based programs that assign an agent to no more than twenty-five

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cases, and subject offenders to curfews, drug tests, educational and work standards, community service, restitution, and similar requirements. Known as intensive supervision programs (ISPs), they are far more expensive to administer than conventional probation or parole programs.

Some ISPs, however, have handled offenders who would otherwise remain behind bars. In these cases, the relevant comparison is between ISPs and incarceration. Though by no means definitive, the preliminary evaluations of these ISPs have been encouraging—a savings of about $6,500 per offender per year; lower recidivism rates; and offenders able to compensate their victims, renovate abandoned buildings, and return something other than trouble to their neighborhoods.

We should study ISPs more systematically; none of the major evaluations, for example, used random assignment and concomitant experimental procedures. But there is no need to wait for these studies before moving aggressively to expand the use of ISPs. In this case, common sense endorses what social science has yet to demonstrate, and the problems are too pressing to permit such delays. The programs are also becoming politically popular; conservatives like them because they save money while giving criminals more than a mere slap on the wrist, while liberals like them because they are a sensible alternative to incarceration.

There are other correctional options. Some have proposed placing young felons in "boot camps" that are run in a no-nonsense, paramilitary fashion. Rather than being placed on probation or spending time in a conventional prison, offenders spend several months (or several weeks of "shock incarceration") in a boot camp. Over the last few years, New York, Georgia, and several other states have experimented with such facilities.

To date, there are no meaningful evaluations of the effects (if any) of boot camps on recidivism rates, or of their cost-effectiveness. But contrary to the worries of early critics (myself included), boot camps have not turned into oppressive or abusive places. Instead, the orderly environments of these institutions have let inmates receive remedial education and other basic training that may enhance their own life prospects, while making them less likely to ruin the lives of others upon their release. Together with ISPs, boot camps are an effective way of handling the underside of the underclass and should be used more extensively.

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The third and final prong of the strategy is *more programs aimed at diverting ghetto youngsters from drugs and criminal pursuits*.[9] Many cities, most notably Philadelphia, have "crisis intervention" programs that bring community leaders into contact with gang members. In some cases, these programs have worked to defuse gang violence. In other cases, they have lured even hardened street toughs away from the "fellowship" of the gangs and the pleasures of drugs and drug money.

Most cities now have some type of drug-education program; but most of these programs are targeted at high school students (many of whom have already succumbed to drugs) rather than elementary school children (who might be taught to avoid the temptation).

In Kenilworth-Parkside, an interesting youth program is under way. Youngsters are being employed to make, package, and sell bags of cookies. They work on a commission basis. Many earn up to $45 a day and some earn even more. That is less than they could pocket "running" drugs, but these streetwise kids know that selling crack involves some risk of going to jail or getting murdered, while selling cookies to their law-abiding neighbors does not.

As James Q. Wilson has observed, one of the best "programs" to keep youngsters from joining the ranks of the truly deviant is good parenting. Quite correctly, Wilson rejects the idea of a "national family policy" to prevent juvenile delinquency. But he "wonders whether, starting small and in a frankly experimental mode, we might not do more to prevent" poor child-rearing practices from contributing to the problem. So do I, especially where underclass toddlers living in single-parent households are concerned.

Locks, cops, and studies

Camden, New Jersey, is directly across the bridge from Philadelphia. Once-decent areas have become just like my grandmother's old neighborhood: isolated, crime-torn urban war zones. In February 1989 a priest doing social work in Camden was ordered off the streets by drug dealers and threatened with death if

[9]This need was stressed by several participants in a conference on urban problems sponsored by the Congressional Black Caucus and held in Washington, D.C., in mid-September 1988. I wish to thank Kalil Munir, the conference organizer, for the additional insights that I received from him in a subsequent phone interview. See also James Q. Wilson and Glenn C. Loury, *Families, Schools, and Delinquency* (New York: Springer Verlag, 1987).

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he did not obey. The police chief of Camden sent some extra men into the area, but the violent drug dealers remained the real rulers of the city's streets.

The month before the incident in Camden, the Rockefeller Foundation announced that it was going to devote some of its annual budget (which exceeds $100 million) to researching the underclass problem. Other foundations, big and small, have already spent (or misspent) much money on the problem. But Rockefeller's president was quoted as follows: "Nobody knows who they are, what they do.... The underclass is not a topic to pursue from the library. You get out and look for them."

His statement was heartening, but it revealed a deep misunderstanding of the problem. Rather than intimating that the underclass was somehow hard to locate, he would have done better to declare that his charity would purchase deadbolt locks for the homes of ghetto dwellers in New York City who lacked them, and subsidize policing and private-security services in the easily identifiable neighborhoods where these poor people are concentrated.

More street-level research would be nice, especially for the networks of policy intellectuals (liberal and conservative) who benefit directly from such endeavors. But more locks, cops, and corrections officers would make a more positive, tangible, and lasting difference in the lives of today's ghetto dwellers.

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The failure of AIDS-prevention education

WILLIAM E. DANNEMEYER & MICHAEL G. FRANC

FOR MOST of this century, public-health officials have relied on a few basic techniques to contain contagious diseases. They have assumed that serious infectious diseases can be controlled only by interrupting the chain of transmission. To do so they have attempted to locate carriers of the disease, to alert those who may have been exposed to it, to offer counseling to prevent further transmission, and to ensure that infected individuals desist from all activities that might spread the disease. Those who persist in knowingly spreading the disease have been subject to incarceration.

Almost every state requires public-health officials to follow these procedures with respect to diseases such as syphilis and gonorrhea. California, for example, requires physicians to report more than fifty infectious diseases to health authorities, including chancroid, infectious hepatitis, the plague, Rocky Mountain spotted fever, smallpox, syphilis, tuberculosis, and yellow fever.

Unfortunately, the AIDS epidemic has aroused political forces that have precluded the application of these traditional public-health measures to the human immunodeficiency virus (HIV).

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Only a handful of states have required that positive HIV test results be reported (confidentially) to patients, implemented a system to trace the contacts of people who test positive, or established procedures to deal with recalcitrant carriers. Even fewer have established programs that routinely offer voluntary HIV tests to people in high-risk areas when they come into contact with the public-health system—whether in hospitals or clinics, whether for sexually transmitted diseases or intravenous drug abuse.

Public-health officials instead have instituted anonymous testing for HIV. As University of Minnesota physician Dr. David Pence has explained, anonymous testing should not be confused with confidential testing. In an important 1987 address, Pence elaborated on this crucial distinction:

> Confidential testing means results are known only to the patient, his doctor, and public health officials. This is the standard practice throughout medicine. Anonymous testing means a person is tested without giving his name. This practice is unique to the HIV infection. *Con fidem* means "with faith or trust." *A nomos* means "without a name." In this juxtaposition of two Latin phrases we find the failure of our present policy.

Proponents of anonymous testing, Pence explains, have convinced the public-health establishment that neither the government nor the medical profession can be trusted. People at risk are given complete discretion over whether to request a test for HIV, and over whether to warn their sexual or needle-sharing contacts that they might be infected. Pence attributes the insistence upon anonymous testing to the Vietnam generation's suspicion of government's police power:

> At the heart of the debate [is] a discussion of the legitimate policing functions of local communities and their public health agencies. This is a difficult concept for the younger public health officials who have been raised in a cultural milieu hostile to police work. Most of the new generation officials are considerably more comfortable with their role as educators than their function as enforcers.

Those holding this view have great political power. In the waning days of the 100th Congress, for example, a unified public-health establishment helped defeat a proposal by Florida Representative Bill McCollum that would have required states to enact limited contact-tracing programs for spouses who may have been exposed to the AIDS virus. Many observers regarded the McCollum Amendment as a rather modest attempt to rein in the epidemic. Why should anyone object to warning the unsuspecting

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spouse of an intravenous drug user or a bisexual man that she may have been exposed to a fatal virus by someone without the moral courage to reveal his positive test results? Yet McCollum's proposal lost by the lopsided margin of 279 to 105.

The education-only approach

The response to the burgeoning AIDS epidemic to date has been confined to what we will call the education-only approach. This approach focuses exclusively on education to convince homosexuals and intravenous drug users to change their behavior in ways that will eliminate the risk of HIV transmission. Unfortunately, the education-only approach has failed miserably with respect to the urban underclass, the locus of the second wave of the AIDS epidemic. This second wave began in the inner cities' crack houses and shooting galleries and has now spread to the non-drug using spouses, sexual partners, and offspring of intravenous drug users.

Those who accept the education-only approach assume that even the most desperate heroin or cocaine addicts can be taught the self-control required to use clean needles and engage only in "safe" sexual practices. They believe that these people will ascertain their HIV status, will inform their sexual partners of their high-risk behavior, and will never knowingly expose them to the AIDS virus. Education-only advocates think that heroin and cocaine addicts are able to control their actions so as to prevent HIV transmission.

This belief is naive. A study conducted by Dr. Mindy Thompson Fullilove, a San Francisco physician, focused on the sexual habits of two hundred black teenage crack users and found that 27 percent of them reported having had five or more sexual partners in the previous year, with 12 percent admitting to having had more than ten partners. Over one-third said that they never used condoms, and most of the rest said that they rarely used them—in spite of the fact that 80 percent understood their value in preventing the spread of HIV. The explanation for this behavior may lie in Fullilove's finding that almost half of those surveyed said that they had sex while high on drugs.

As Fullilove noted, "This is not an ignorant group." Their behavior instead results from the nature of intravenous crack use; users often exchange sex for drugs, which they then typically inject every five minutes to maintain their high. For such an incorrigible population, the only effective educational outreach would involve targeting unsuspecting heterosexual contacts.

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In a recent sobering assessment of poverty trends in *Commentary*, Charles Murray agrees that the education-only strategy currently favored by most health professionals for fighting AIDS mostly fails to reach high-risk people in minority communities. Murray observes that since 1982 the number of AIDS cases reported to the Centers for Disease Control (CDC) has risen 3.8 times faster for blacks than for whites. Education alone, he notes, is ill-suited to reach members of the urban underclass. Murray contrasts such people with the homosexual men who accounted for the vast majority of the first victims of the AIDS epidemic:

> Homosexuals tend to be well-informed, and in many places well-organized, and have demonstrated their readiness to change behavior. Among blacks, by contrast, only 38 percent of AIDS cases involve homosexual, non-IV-drug-abusing males. Almost all of the rest are associated with drug abuse, heterosexual transmission, or transmission from mother to infant. Most of these cases occur in populations that are notoriously difficult to reach with educational programs: not only drug addicts, but the homeless, the chronically unemployed, those living in large inner cities.

The *Los Angeles Times* recently echoed Murray's observation in an editorial. It noted the growing incidence of HIV among blacks and Latinos in Los Angeles County and concluded: "There is no evidence that public health education efforts have succeeded in winning substantial behavior changes to safer sex practices in these groups and communities." Even the *Journal of the American Medical Association* (*JAMA*) editorialized recently that "behavior has not changed much and HIV-1 seroprevalence has continued to climb" in San Francisco, even though public-health authorities there have made "strenuous educational and intervention efforts" to reach intravenous drug users.

Physicians who treat drug-related cases of AIDS in the inner cities agree. One told the *Los Angeles Herald-Examiner* that interrupting the spread of the epidemic in these communities presents a unique challenge to health officials. "It's much harder for drug users," he said. Physicians must contend with "a bunch of poor people with chactic, disordered lives," who cannot be expected to help themselves. "I don't think that that's a realistic expectation. We need to build a public health system for drug users."

AIDS in the inner cities

In the absence of such a system, CDC data reveal that the AIDS epidemic is now spreading most rapidly among intravenous

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drug users. After several years in which the intravenous drug component of the epidemic accounted for about 17 percent of all cases reported to the CDC, in 1988 full-blown cases of AIDS among drug users suddenly jumped to 24 percent of all new cases, a rate that has continued in 1989. Should this trend persist, the epidemic will reach tens of thousands of inner-city residents, as the non-drug using spouses, sexual partners, and offspring of intravenous drug users are infected.

The portents of disaster are apparent. Study after study of inner-city residents—both drug users and their sexual partners—indicates that the AIDS epidemic has reached the alarmingly high level that was common among homosexual males several years ago. The government's official estimates of the prevalence of AIDS have come under closer scrutiny, and many experts now conclude that the extent of the problem is much greater than was previously believed.

Dr. Rand L. Stoneburner of the New York City Department of Health reviewed the 7,884 deaths in New York City between 1978 and 1986 that had been listed as "narcotics-related" and found that many of them were also AIDS-related, even though AIDS was not officially listed as the cause of death. Stoneburner discerned "an increase in mortality among IV drug users in New York that is not captured by [the CDC's] surveillance definition [of] AIDS but is likely to be related to HIV infection." He estimates that the true number of HIV-related deaths in New York between 1982 and 1986 is at least 134 percent higher among drug users than was reported to the CDC. Dr. Stephen Joseph, the city's Health Commissioner, puts the figure at 150 percent.

An anonymous survey of HIV seroprevalence among newborns conducted by the New York State Department of Health confirms Stoneburner's fears that official figures understate the prevalence of AIDS. Through May 31, 1988, New York tested 133,781 newborn infants for HIV antibodies. A positive test result on a newborn clearly indicates that the mother is infected. These mothers, in turn, most likely contracted the virus from sharing needles or having sex with infected drug users or bisexual men. The results of the New York survey attest to the disturbing extent to which the epidemic has penetrated the general population, especially those who live in poor inner-city neighborhoods.

The statewide infection rate was 0.67 percent, about twice the infection rate found in the CDC sentinel hospital and college-

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campus surveys; it is cause for great concern. The pockets of infection in certain urban areas, however, tell the real story; in the five boroughs of New York City the infection rate was 1.29 percent. In the Bronx, which has one of the worst drug problems in America, the infection rate among pregnant women was 1.89 percent.

If nearly two of every hundred pregnant women in the Bronx are infected with the AIDS virus, one can only speculate what the infection rate in particular Bronx ghettos is, or what the rate is among the men who have sex with the women there or share their needles. The overall infection rate may exceed 10 percent in certain neighborhoods; the same New York State survey sampled 494 males who entered the Downstate Correctional Facility in New York City consecutively, and found an overall seroprevalence rate of 17.4 percent. The infection rate among those arrested in New York City exceeded 20 percent. Even in California, where the intravenous drug component of the epidemic had been thought negligible, between 2.5 and 3 percent of the state's prison population is seropositive.

A recent Citizens' Committee for Children survey, which covered twenty of the forty-eight hospitals with pediatric units in New York City, suggests that the epidemic is claiming many more victims than are listed in the CDC's official reports. The survey found that 828 children with CDC-defined AIDS or clinically apparent HIV infection received care in 1988. The city's Department of Health, however, reported only 134 CDC-defined AIDS cases in all forty-eight hospitals during this period. The underreporting in this instance missed HIV disabled children by at least a factor of six. Most ominously, the extent of pediatric infection may be worse; only eight of the hospitals surveyed stated that they report all such cases to the CDC.

In Baltimore, researchers screened over four thousand patients at several clinics specializing in sexually transmitted diseases; they found a seroprevalence rate of 5.2 percent, with the highest rates occurring among blacks and adult men. Almost 7 percent of men aged twenty-five to twenty-nine and 11.4 percent of those over thirty tested positive; yet only 7.1 percent of the men in the sample were homosexual or bisexual. The researchers concluded: "As many as 40 percent of seropositive men and 62 percent of seropositive women may have acquired HIV through heterosexual transmission. It can be expected that HIV infection rates will continue

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to increase among blacks of both sexes unless intervention programs for HIV infection that are aimed at minority groups are initiated immediately and prove to be successful."

Intravenous drug users and the failure of education

We now know that we cannot expect an education-only approach to be successful. Greenwich House, a major substance-abuse treatment facility in New York City, recently completed a study funded by the American Foundation for AIDS Research (AmFAR) on the effectiveness of AIDS education for substance abusers. The researchers selected eighty-two clients, sixty-two of whom completed the study—that is, they returned for a follow-up evaluation three months after receiving the education.

The participants in the study were clearly the cream of the crop of intravenous drug users. As the researchers explained, the sample was biased in several important ways: "It was drawn from a clinic population, which is inherently self-selected; persons within that unique population further self-selected by deciding whether they would participate in the study; finally, erosion of the sample occurred due to dropouts." In addition, the participants were surprisingly well-educated for drug users. Fifty-four percent reported that they had attended college or even completed it; street users, who do not seek professional help, are much less educated. Since even this experiment's results were discouraging, similar efforts directed at the general intravenous-drug using population are likely to fail dismally.

The participants in the Greenwich House study were ominously cavalier about their risk status. Only about one-third had been tested for HIV; one in five of this group did not even know the test results. Of those not tested, 46 percent said that they did not consider themselves at risk; 20 percent said that they simply did not want to know. Only 9 percent cited the fear that their confidentiality would be breached in explaining why they had not been tested—a strikingly low figure, given the importance that the education-only theorists attach to this fear.

Ironically, these drug users favor the very public-health measures that many health officials oppose. Seventy-six percent believe that infected individuals should be required by law to tell their sex partners; 63 percent favor mandatory HIV screening at all drug-treatment centers; 63 percent believe that those who knowingly transmit the AIDS virus should be incarcerated. In addition,

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46 percent believe that giving out free needles will encourage drug use.

These drug users also doubt that people who are high on drugs will avoid risky activities. Three in four, for example, believe that drug users who need a fix will not worry about the condition of their needles; 86 percent assert that people who are high on drugs are less likely to use condoms. Four in five believe that people who want to have sex will do so, whether or not condoms are available. Two-thirds feel that men will not use condoms because they "make sex less pleasurable."

How effective was the educational program? The researchers concluded: "The overall knowledge gain among respondents indicated that the AIDS education seemed to have some effect. However, this did not seem to alter the sexual and drug practices of the sample in a substantial way."

Even this guardedly optimistic conclusion misses the main point. The results suggest that the participants actually knew less about safe sex and the dangers of needle sharing after the study than before it. In terms of "total" AIDS knowledge, 37 percent regressed and only 26 percent improved; with respect to "drug-related" AIDS knowledge, 23 percent lost ground and only 16 percent improved. Furthermore, more than twice as many regressed (21 percent) as advanced (10 percent) with respect to "sex-related" knowledge.

Three months after the study 41 percent of the participants knew the proper use of a condom. Unfortunately, when the study began, 49 percent answered the same question correctly. Participants in the study reported only slight decreases in vaginal, oral, and oral-anal sex. More than half the participants continued to engage in oral and vaginal sex three months after the completion of the study. There was virtually no change in the number of participants—about 10 percent—who engaged in anal sex.

Nor did the educational efforts deter drug use. More blacks and Hispanics injected drugs after the study (42 percent) than before it (33 percent), an increase that is perhaps reflected in the increase among those who injected cocaine (from 23 percent to 26 percent). The only progress occurred in the number of those who shared needles; the percentage dropped from seventeen to eight.

The most disturbing finding, however, was that 25 percent of the participants said that they would continue to have sex even if they learned that they were HIV positive.

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The Harlem Hospital Center study

The Greenwich House researchers warned that their findings should not be generalized, due to the small number of participants in the study. But another study, conducted by a team at the Harlem Hospital Center in New York City and reported in the *Journal of the American Medical Association*, tested a much larger sample of drug users and reached many of the same conclusions.

The Harlem Hospital Center study surveyed 868 patients and forty-six staff members in the hospital's methadone-maintenance clinics with respect to their attitudes on AIDS. As in the Greenwich House study, the drug users were remarkably nonchalant about their risk. About half said they did not believe that they were at risk; only one in five had been tested; 15 percent of those who had been tested had not bothered to learn their test results.

Like their counterparts in the Greenwich House study, the patients strongly supported traditional public-health measures to control contagious diseases. Almost three quarters favored routine voluntary HIV testing at the clinic and more than half supported a *mandatory* testing program there. Again, large majorities supported partner-notification programs for sex partners (84.1 percent) and for those who share needles (80.2 percent). Majorities also favored less stringent confidentiality laws that would allow physicians, nurses, and counselors to learn of positive test results.

The staff also strongly preferred traditional public-health measures to control the epidemic—even though nearly all of the national health organizations based in Washington favor the education-only approach. Virtually all of the staff supported voluntary (97.8 percent) or mandatory (82.6 percent) testing at the clinics, and the reform of confidentiality laws to inform physicians, nurses, and counselors of positive test results. Large majorities also opposed the distribution of clean needles (73.9 percent) and bleach (65.2 percent) to intravenous drug users.

The survey also reinforced the conclusion that the education-only approach has done little to slow the spread of the epidemic. As in the Greenwich House study, the percentage of patients who reported sharing needles dropped from 20 percent in 1987 to 9 percent in 1988. Similarly, the percentage of patients reporting multiple sex partners dropped from almost 30 percent to 15 percent. Although these results may seem encouraging, the researchers caution that they are unsatisfactory for such a high-risk group:

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> Uninfected persons in intimate sexual or needle-sharing contact with a population group with a high prevalence of HIV infection must make *extreme* reductions in risk-taking behavior to prevent becoming infected. For example, if their associates are 50 percent infected, little protection would be gained by a reduction in the number of sex or needle-sharing partners from fifty to five, since they would still be heavily exposed to the virus.

In a high-risk group such as intravenous drug users, it is simply unacceptable for 15 percent to have sex with multiple partners and for 10 percent to share needles.

What is more, many intravenous drug users, especially men who share needles, have sex with nonusers. Debra L. Murphy of the Columbia University School of Public Health documented the sexual-behavior patterns of drug users and found that 40 percent of the women and 70 percent of the men have sex with people who do *not* use drugs. Fully 78 percent of male intravenous drug users who share needles report having sex with nonusers. Murphy undoubtedly understates the case when she concludes that intravenous drug users "may play a very important role" in exposing the general population to the AIDS virus.

The AIDS Outreach Intervention Project

Armed with a $3.2 million grant from the National Institute on Drug Abuse (NIDA), the AIDS Outreach Intervention Project at the University of Illinois at Chicago is assessing HIV seroprevalence among a street population of intravenous drug abusers. Principal investigator Wayne Weibel and project director Herbert J. Horan employed former drug abusers to establish personal contact with Chicago drug users. By November 1988 the researchers had completed more than a thousand interviews with local users and conducted 956 HIV blood tests. The NIDA study, which will take three years to complete, represents the first systematic effort to establish the extent of the AIDS epidemic among intravenous drug users who have not sought counseling or otherwise attempted to end their habits—that is, habitual street users.

Preliminary results from the Chicago portion of the study confirm the hypothesis that drug users who seek professional help at clinics are much different from those who remain on the street. Tom Lampinen, a graduate student who worked on the project, reviewed demographic data from several Illinois testing sites and found "striking" differences between the users who are tested at

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these sites and the street users who participated in the study. Compared with those tested at the sites, the street users were less educated (2 percent had completed college compared to 26 percent), more likely to be unemployed (80 percent unemployed compared to 36 percent), and more likely to have injected heroin (92 percent compared to 54 percent). Demographically, those tested at the sites resemble the participants in the Greenwich House study.

Not surprisingly, the researchers found that state HIV test sites in Illinois may be overlooking substantial epidemics of HIV. The Outreach Project found a seroprevalence rate of 21 percent, with pockets of infection running as high as 30 percent on Chicago's west side. In contrast, the state test sites report infection rates of only 10 percent. Among those who were HIV-positive, the researchers found two distinct groups—those whose chronic drug use had diminished their sexual activity and those who exchanged sex for drugs. Over 34 percent of infected users reported having sex with eleven or more partners in recent months; only 10 percent of all those interviewed reported no sexual activity. Nine in ten admitted sharing needles; only 19 percent said that they sterilized them before injection.

Partners of intravenous drug users

Recent data indicate that infected drug users are spreading the virus to their heterosexual partners. "Those who binge on cocaine and who trade sex for drugs," *JAMA* concluded in a recent editorial, "pose the risk of propagating HIV-1 beyond just the [intravenous drug abuser]. The impact on the heterosexual population is becoming evident in current statistics."

The editorial's author, Dr. Stanley Weiss of the New Jersey Medical School in Newark, reported that the sexual partners of intravenous drug users now constitute the majority of AIDS cases attributed solely to heterosexual contact. Using CDC data, Weiss found that of 5,324 cases of AIDS among adults in New Jersey as of November 30, 1988, 54 percent were linked to heterosexual drug users and 8.4 percent to heterosexual contact alone. More alarmingly, of the first 1,112 cases diagnosed in 1988, 11.6 percent—almost three times the national average—were heterosexually acquired, with the majority coming from areas with spiraling drug-abuse problems. One team of researchers in the Bronx, in fact, interviewed and tested the drug-free partners of intravenous drug users and found a seropositivity rate of 48 percent, with seven of

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twelve male and forty-one of eighty-eight female partners testing positive.

Most of the heterosexual transmissions in these areas are from males to females. Women in these neighborhoods are the first victims of the education-only philosophy. As Dr. Janet Mitchell, Director of Perinatology at New York's Harlem Hospital Center, explained: "Women are often the last to know the habits of their partners."

Women are four times as likely as heterosexual men to acquire HIV through heterosexual intercourse, says Dr. Mary Guinan, an epidemiologist who works for the CDC in Atlanta. Guinan predicts that in five years heterosexual intercourse will overtake intravenous drug use—which currently accounts for 53 percent of all cases of full-blown AIDS among women—as the most common route of transmission among women.

Not all intravenous drug users, of course, hail from the worst urban ghettos. Dr. Jordan Glaser, Director of the Department of Infectious Diseases at Staten Island Hospital in New York, surveyed the heterosexual contacts of thirty-two HIV-positive middle-class intravenous drug users. The typical contact was a white, married woman in her thirties living in a household with an average income of $41,200. Most of the contacts were monogamous, had been married an average of six years, and reported only one lifetime partner. Needless to say, these contacts did not regard themselves as being at risk for HIV infection.

Thirty of the thirty-nine contacts agreed to be tested; seven were positive. Fewer than half of the contacts were even aware of their partner's drug habit at the start of the sexual relationship. Four learned of it upon being told of their positive test results. Reflecting on his findings, Dr. Glaser concluded that among intravenous drug users

> AIDS is a disease of monogamy, not promiscuity.... These cases are particularly disturbing to us as clinicians. This is because the women who became infected are for the most part innocent victims of their spouses' behavior. Some have only found out about their spouses' high risk behaviors upon being diagnosed HIV positive.

Dr. Guinan of the CDC believes that the extent of middle-class HIV infection is much greater than reported. "I know of many cases where the husband and wife are dead, they've left three children, and it's never been reported." Many women, especially, seek medical help from physicians who never think to look for

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HIV. Dr. Janet Mitchell of the Harlem Hospital Center believes *all* women admitted to hospitals in high-risk areas should be tested for HIV.

Support for Mitchell's observation comes from the most recent data from the military testing program. Since October 1985 there has been a statistically significant decrease in HIV infection among male recruit applicants, from 1.7 per 1,000 to 1.2 per 1,000. Among women, however, the seroprevalence rate has remained constant at between 0.7 and 0.8 per 1,000. This suggests that homosexual men and intravenous drug users, aware of their HIV status or suspecting that they are infected, have been removing themselves from the applicant pool while infected women continue to apply, unaware that they have been exposed to the fatal virus.

A policy response

A coherent response to the AIDS epidemic in the inner cities requires: (1) confidential, identity-linked reporting of positive HIV test results to public-health authorities; (2) aggressive programs to alert unsuspecting sexual partners of those who test positive that they may be at risk; (3) elimination of barriers to testing, such as the requirement for written consent, now placed between physicians and their patients; (4) routine offering of voluntary HIV testing to those who come into contact with the public-health system in high-risk areas; and (5) criminal penalties for those who, knowing that they are infected, expose others to the virus.

Physicians should have complete discretion to test patients whom they believe to be at risk of infection. As David Pence has pointed out, testing a patient's blood is part of the implied consent that a patient grants his physician. This covenant between physician and patient allows the physician tremendous latitude in testing for infectious agents. "The AIDS virus," Pence concludes, "does not belong to a protected class. If it makes its way into a hospital, only a routine doctor's order is required to expose it." Obstacles to testing prevent high-risk individuals from receiving the best possible care.

The outlook for the measures advocated in this article has brightened considerably in recent months. On January 1 the most comprehensive public-health response to the epidemic went into effect in Rhode Island. After considerable political turmoil, State Health Commissioner H. Denman Scott persuaded the legislature to enact a sweeping measure that requires reporting; partner

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notification; and routine HIV testing of certain hospital patients, couples applying for marriage licenses, and members of several high-risk groups, including people treated for sexually transmitted diseases and intravenous drug use. The new law also requires testing for most of the state's prison population.

Perhaps the most significant assault on the education-only mentality occurred in a speech delivered in Montreal at the Fifth International Conference on AIDS by New York City Health Commissioner Joseph. Joseph told the conferees that "we are fast approaching a time when we will have no choice but to change some of our most basic HIV-related policies." He then announced his support for a system of confidential reporting of HIV infection, coupled with aggressive partner-notification programs to notify those at risk of infection. He predicted that these techniques "will become standard public-health applications for controlling HIV infection and illness."

Dr. Joseph's willingness to make this case publicly is extremely significant. New York City's AIDS caseload exceeds those of Los Angeles, Washington, Houston, and San Francisco combined, so the policy changes that New York City officials contemplate will be seriously considered by their counterparts elsewhere. As the extent of infection among intravenous drug users becomes more apparent, moreover, the policies advocated by Dr. Joseph may be adopted by other public-health officials looking for an alternative to the education-only approach.

A growing number of states, including Michigan, Oregon, Colorado, South Carolina, Utah, Ohio, and Arkansas, have adopted thoughtful measures to control the epidemic. Significantly, the state medical societies in New York, Pennsylvania, and Florida have all endorsed many of the public-health protections—notably, confidential reporting—advocated here. Unfortunately, the states that now require confidential reporting account for less than 10 percent of the cases of full-blown AIDS reported to date. Until the states with the largest pools of infection—notably California and New York—adopt these measures, HIV will continue to claim the lives of thousands of innocent residents in the inner cities. The time has come for public-health officials everywhere to reevaluate the education-only approach to the epidemic.

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The AIDS perplex

DAVID L. KIRP

THE FIRST decade of the AIDS epidemic is drawing to a close, with no clear understanding of the full scope of the disease's impact. The present situation—95,000 AIDS cases reported in the United States in mid-1989—is bad enough, but not nearly so troubling as what inevitably lies ahead in the next five years. The Centers for Disease Control (CDC) estimate that AIDS has already infected between 945,000 and 1.4 million Americans; by 1993, say the CDC, there will be 450,000 full-blown AIDS cases in the U.S. Even as the rate of infection among homosexual men declines, increased rates of viral transmission through intravenous drug use and heterosexual sex, disproportionately among blacks and Hispanics, will push these figures higher.

Worldwide, there will be more than a million reported cases by the early 1990s, the World Health Organization (WHO) reports. More than half will be from Africa, where inadequate epidemiology, social taboos, and political calculations rooted in (perhaps not entirely unjustified) suspicions of racist finger-pointing will keep the official numbers artificially low. The actual worldwide count, says WHO, could be more than twice as high.

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Beyond this more or less knowable immediate future, things are more uncertain and potentially far more catastrophic. Mathematical forecasting models reach very different conclusions about the spread of AIDS a decade from now. Reputable optimists in the scientific community imagine a disease that is running its course, at least in the developed nations. Equally reputable pessimists such as Stephen Jay Gould speculate about a pandemic that could claim the lives of a quarter of the world's population. Those gross differences, and the entirely different visions they evoke in our imaginations, are inevitable when key factors—among them the projected rates of transmission through heterosexual sex and intravenous drug use, the likelihood that an effective vaccine can be developed, and the possible development of new HIV strains that will complicate efforts to defeat AIDS—cannot be predicted.

It is not just the AIDS numbers that are hard to grasp but also, more significantly, their meanings. From the beginning, there have been alarmists who have seen AIDS as an apocalypse. The tocsin has been sounded by different people for different reasons—by homosexual activists (most notably Larry Kramer in his play *The Normal Heart*), to inform their fellows of the perils of promiscuity; by social scientists and laboratory researchers, to attract political interest and money to study the disease; by sexologists Masters and Johnson, who in *Risk: Heterosexual Behavior in the Age of AIDS*, published last year, misuse epidemiological data to claim that "the AIDS virus is now running rampant in the heterosexual community"; and by extremist Lyndon LaRouche, to incite popular paranoia.

Understandably, there has also been a countertendency to domesticate AIDS by describing it in familiar terms. This urge to minimize is apparent in calls to treat AIDS simply as a matter of public health, disentangled from politics and passions. In the ceaseless debates over AIDS policy, each side has frequently accused the other of using science for political purposes. The argument over whether the names of all those who test positive for HIV must be reported to public-health officials, waged during 1988 in Congress and in California (where a proposition requiring such reporting was defeated by the voters in November 1988), has just this character. Proponents insist that AIDS be treated like any other sexually transmitted disease and accuse their antagonists of caving in to the militant homosexual crowd. They find a scattering of doctors who support their view. Opponents maintain that de-

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manding notification is the politicizing act, producing only fear and driving underground those most at risk. They rest their argument on the seemingly neutral wisdom of former Surgeon General C. Everett Koop.

In *AIDS and Its Metaphors*,[1] Susan Sontag's subject is public language, not public policy. But as George Orwell pointed out decades ago in "Politics and the English Language," the two are intimately connected: we are, in good part, what we say. Sontag's ambition is to strip the barnacles of meanings from AIDS, to treat it as just a disease. Sandra Panem, in *The AIDS Bureaucracy*,[2] has a very different subject: the management of the federal agencies that make AIDS policy. But her goal, like Sontag's, is to put AIDS into a familiar category—disease, for Sontag; public-health emergencies, for Panem—and in so doing to deemphasize its uniqueness.

Both Sontag and Panem are undone by this common intention. The implications of AIDS are unlike those of cancer, Sontag's signal example of a disease made more killing by the language of fault that has been attached to it. Nor, *pace* Panem, is AIDS like swine flu or tuberculosis.

AIDS is a plague, the kind of event that, as recently as fifteen years ago, many scientists believed would never again trouble us. It has sweeping and entirely contemporary consequences for relations between intimates, and between the government and the governed. AIDS tests both personal and public character—a point made with force and grace in Ronald Bayer's *Private Acts, Social Consequences*.[3] Thinking through its implications without succumbing to paralysis requires us to resist both the familiar and the apocalyptic.

AIDS metaphors and their meanings

With AIDS, even more than with other diseases, imagery bears on policy; consider, for instance, the mammoth quilt memorializing the victims of AIDS that has stirred passions around the country. A decade ago, when she herself was seriously ill with cancer, Susan Sontag wrote *Illness as Metaphor*. That essay was, and re-

[1] Susan Sontag. *AIDS and Its Metaphors*. Farrar, Straus & Giroux. 96 pp. $14.95.
[2] Sandra Panem. *The AIDS Bureaucracy*. Harvard University Press. 208 pp. $22.50 cloth, $9.95 paper.
[3] Ronald Bayer. *Private Acts, Social Consequences: AIDS and the Politics of Public Health*. The Free Press. 288 pp. $22.95.

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mains, an influential statement of the consequences of using disease as a cultural metaphor. Such images, Sontag argued, invite people afflicted with the disease—cancer in the 1970s, tuberculosis earlier—to perceive themselves with shame, which encourages them in their denial and dissuades them from receiving treatment that could save their lives.

"The purpose of my [earlier] book was to calm the imagination," Sontag declares in *AIDS and its Metaphors*, "by insisting on candor and not mystification in approaching cancer, by rejecting the contention that this disease had any intrinsic meaning." Never mind that all thinking—including medical thinking—is metaphoric, that we cannot understand something except by likening it to another thing: there is something of value in the intention to stand against interpretation.

With AIDS, too, it is useful to calm the imagination; but AIDS and cancer are different in ways that undermine Sontag's project. If cancer made newly vulnerable those it affected, AIDS seemingly singled out the already vulnerable—homosexuals and intravenous drug users—as its targets, condemning both the actors and the acts. Cancer patients have generally met with humane concern rather than revulsion, while victims of AIDS were already the targets of ancient hatreds.

It is unclear where, precisely, Sontag locates the mischief inherent in AIDS metaphors. In some passages of her essay she cites metaphoric language itself as the source of destructiveness, but that is to attack every attempt at description. Elsewhere she directs her animus against the military metaphor for disease: "It overmobilizes, it overdescribes, and it powerfully contributes to the excommunicating and stigmatizing of the ill" by demonizing the disease and its patients. Yet the symbols of belligerence can be powerful aids to those suffering from AIDS, actually encouraging them to seek help and to come to their own defense. This is true of all illnesses, but AIDS (for which, unlike cancer, there are no cures) seems to magnify the need to deploy military metaphors. That much is attested to by the volumes of prose, drenched in the language of combat, that have been written by those touched by the disease.[4]

[4]See, e.g., Emmanuel Dreuilhe, *Mortal Embrace: Living with AIDS* (New York: Farrar, Straus & Giroux, 1988), and Paul Monette, *Borrowed Time: An AIDS Memoir* (New York: Harcourt Brace Jovanovich, 1988).

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It is the uses of metaphor, not metaphor itself, that potentially cause the most trouble. The language of warfare can be applied to define someone with AIDS as the alien, as in columnist Patrick Buchanan's assault on the "sodomist," upon whom nature takes "revenge" for having "declared war on nature." But even here the critique of metaphor needs qualification, for the same imagery can also help mobilize us against a disease (the War on Cancer) or a social evil (the War on Poverty), by invoking what William James called the moral equivalent of war. In those instances, as Sontag acknowledges, the military metaphor is a way of asking people to act in ways that the calculus of self-interest does not contemplate—to set aside the notion of pleasure without price, of harmless recreational sex and drug use, and to replace it with a commitment to civic-mindedness.

Metaphors are useful when they help us to comprehend the incomprehensible. To refer to AIDS as the "gay plague," as did a 1983 *Newsweek* cover story, was to misdescribe the disease. But the less charged reference to AIDS as a plague evokes memories of our greatest collective disasters. It invites us to resist the temptation to minimize the implications of the disease. It also invites us to imagine, as in Albert Camus's *The Plague*, the possibility of a communal response to something that touches us all. As with the language of warfare, the meaning of this metaphor depends on circumstance, but there is no escaping the need for metaphor.

Mismanaged AIDS

Sandra Panem's account of the management of AIDS in *The AIDS Bureaucracy* occupies the middle-brow terrain of policy discourse. There are no multifaceted metaphors here, but only a discussion of the structural weaknesses of the federal agencies (including the National Institutes of Health, the Centers for Disease Control, the Public Health Service, the Food and Drug Administration, and the Department of Health and Human Services) that have shared—more precisely, have juggled and sometimes evaded—responsibility for AIDS research, preventive education, and health care.

Those structural weaknesses—redundancy and overlap on the one hand, gaps on the other—explain governmental failures, Panem argues. Although the standard operating procedures of our public-health system were sufficient to handle routine demands,

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they could not respond with adequate speed or coordination to an emergency like AIDS.

Panem proposes creating a system to deal with what she calls "novel health emergencies." There would be generous, centrally controlled, multiyear funding, with substantial discretionary authority for expenditure; central management of research, drawing in the nation's best scientists; long-term strategic planning; and early public education.

Many of these recommendations are echoed in the report of the Presidential Commission chaired by Admiral James Watkins.[5] And many of them make sense. Who could argue against emphasizing education—particularly when, in the absence of either a vaccine or a cure, it is the best public-health strategy available? Yet Panem errs in assuming that the design of a federal AIDS policy is simply a matter of applying the neutral calipers of public management, cost-benefit analysis, and public health to a flawed bureaucracy. In fact, wherever one looks in the annals of AIDS, political considerations dominate: these are among the items on the Watkins Commission's lengthy list of "obstacles to progress."

The shortcomings of federal AIDS policy during the early years of the epidemic, when most could have been accomplished to slow its spread, are not due primarily to inadequate communication, to hyperproceduralized mechanisms for distributing money, or to antiquated working conditions at the Food and Drug Administration. Although all those impediments did exist, and many still do, they could have been overcome, given sufficient will. But the problem is at once broader and narrower than bureaucratic structures: it has to do with both the design of health policy and the specifics of AIDS.

Critics of federal AIDS policy, such as Randy Shilts in *And the Band Played On*,[6] write as if the Reagan administration was uniquely hostile to AIDS research. As it happens, each increase in AIDS-related appropriations was foisted by Congress on an unwilling White House. But in this respect AIDS fared no worse—indeed, fared rather better in dollar terms—than any other health initiative. With the significant exception of cost containment, there was little interest on the part of the Reagan administration in

[5] *Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic*. U.S. Government Printing Office. 221 pp. $11.

[6] Randy Shilts. *And the Band Played On: Politics, People, and the AIDS Epidemic*. St. Martin's Press. 630 pp. $24.95.

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exercising leadership on any health issue. Health-care budgets were cut generally. Responsibility was shifted from Washington to the states and private enterprise. The idea of comprehensive health insurance, bruited about in the 1970s, was a nonstarter in the 1980s.

AIDS raised both the level of the demands on Washington and the level of resistance to them. The assertedly unmet needs associated with AIDS seemed endless. In the litany of the Watkins Commission and in *Confronting AIDS*, the generally like-minded report from the National Academy of Sciences published in 1986 and updated in 1988, such needs included education; scientific research into new forms of medical treatment; new methods of treatment, such as at-home and hospice care; and vastly expanded drug-treatment programs.

Not surprisingly, the Watkins Commission presented the White House with a stupendous bill. Equally unsurprising was the Administration's studied lack of enthusiasm. For conservatives, this latest recital of unmet AIDS needs amounted to empire building by self-interested scientists and program padding by constituent-driven congressmen. They saw it as an emotional shout for "more," not rigorous analysis; in their view, such shouts should be met with calls for more cost consciousness and local responsibility. For liberals, on the other hand, the commission's report only confirmed that the Reagan administration's emphasis on localism and privatization, as well as its hypersensitivity to the moral connotations of illness, threatened the public's security against infectious disease.

Hardball politics has been played at each moment in the debate over the proper federal response to AIDS. In *And the Band Played On*, Randy Shilts offers telling tales—of Assistant Health and Human Services (HHS) Secretary Edward Brandt, defending the Administration's budget proposals on the Hill while pleading privately with his bosses for funds to let the CDC and NIH do their jobs; of Susan Steinmetz, New York congressman Ted Weiss's AIDS staffer, being shut out of the CDC on the flimsy pretense of the Centers' protecting the privacy rights of patients; of HHS Secretary Margaret Heckler claiming Administration credit for developing an AIDS vaccine, without any basis and against the advice of her aides.

Shilts also documents the extent to which the Reagan administration's response was premised on the understanding that AIDS primarily targeted homosexuals and drug addicts, two groups for

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which the White House had little regard. In May 1984 Assistant HHS Secretary Brandt was obliged to renege on a commitment to present an award to the Blood Sister Project of San Diego. During a profound crisis in the blood banks, with homosexual men and misinformed members of the general public staying away, the group had persuaded hundreds of lesbians to donate blood. This was Reagan-style voluntarism, but right-wing allies of the Administration insisted that Brandt's acknowledgement of the Blood Sisters was "an outrageous legitimization of a lifestyle repugnant to the vast majority of Americans."

Antagonism to homosexuals and drug users shaped the substance as well as the symbols of federal policy. AIDS education was designed as the cornerstone of this policy. Yet in 1988, at the insistence of Senator Jesse Helms (who threatened to block the first comprehensive federal AIDS legislation) the education campaign was gutted. No federal funds can be spent now "to promote or encourage, directly or indirectly, homosexual sexual activity and intravenous drug use." The CDC, which disburse the funds, read this requirement to mean that no safe-sex instruction for homosexual men and no advice on sterilizing needles can be underwritten by Washington. Nothing more useful than counsels to abstinence may be offered. "Demeaning, disgusting garbage," Helms called one safe-sex video that caught his eye. "We should not allow the homosexual crowd to use the AIDS issue to promote and legitimize their lifestyle in American society." Not even the plea of Utah Senator Orrin Hatch could budge Helms. "I do not agree with their sexual preferences," said Hatch. "But that does not mean I do not have compassion for them, that I am just going to write them off and tell them to forget it, go ahead and die, because they differ from me."

The other health emergencies that Panem identifies—the predicted 1976 influenza outbreak, the threatened depletion of diphtheria-pertussis-tetanus (DPT) vaccine in 1985—did not generate such diatribes. In the AIDS debate, differences in tastes have taken precedence over concern to save lives. Any effective AIDS policy has to confront not just the bureaucratic but the emotive as well—the fear and loathing, the taint of association with the deviant that the disease conjures up in the popular imagination. Responding to AIDS means more than spending more dollars or building better bureaus. It requires emphasizing care for the sick on one side, and social responsibility on the other.

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AIDS and civic-mindedness

Let there be an AIDS "emergency czar," Panem urges. "[T]he responsibility must be placed with knowledgeable public health officials. . .[who can] coordinate diverse health activities during an emergency." The goal of this proposal (which the National Academy of Sciences report and Admiral Watkins, though not his commission, also advanced) is to develop a fact-based strategy untainted by politics and ideology.

But centralization is not value-free. It spells power, and so does coordination, for someone is always "coordinating" someone else. The critical question remains the purpose for which that power is exercised. As Ronald Bayer points out in *Private Acts, Social Consequences*, there is no such thing as an apolitical health policy, and "facts alone do not dictate the course of public health action." Bayer's thesis is not the obvious one that, in matters of social policy, the facts are often uncertain. Rather, he is arguing that negotiation with the body politic—with people who are often (and blessedly) fractious, suspicious, distrustful—is critical to crafting a workable response to AIDS.

Because AIDS is transmitted by intimate behavior whose details cannot be routinely regulated by government, cooperation with those at risk must be the first line of defense—unless, that is, one is willing to adopt the Cuban approach of quarantining everyone with the HIV virus. Difficult questions arise when a course that promotes social welfare infringes upon individual liberty. Sensible responses, says Bayer, fall between the two extremes. They require official actions—aimed at changing individuals' behavior and attitudes to nurture a "culture of restraint"—as extraordinary as AIDS itself.

In writing about AIDS, one easy temptation is to reconfigure the past and settle scores, charging with stupidity or venality those who failed early on to grasp the disease's full implications. But Bayer recalls the complexities, even when detailing debates over matters that today scarcely seem debatable: Should the homosexual bathhouses be closed? Should members of high-risk groups be discouraged from donating blood? In doing so, he reminds us that while the particulars have now been settled, the underlying concerns—over privacy in the first instance, social stigma in the second—remain significant.

Private Acts, Social Consequences takes the reader through the major policy controversies regarding the reporting of AIDS tests,

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the content of AIDS education, the need for mandatory screening and quarantining. Restraint, says Bayer, is required from those at increased risk of transmitting the virus—hence the value of closing the bathhouses, venues of promiscuity, in order to encourage radical changes in private behavior. Restraint and responsibility are also needed from the political and public-health leadership, which has generally opposed alarmism, inviting changes in behavior rather than trying to compel them.

Although the Reagan administration pressed for widespread AIDS testing, most politicians and public-health officials (including, notably, then-Surgeon General Koop) have preferred voluntarism. This was both sensible public-health policy and sensible politics, they argued. Widespread testing would produce an alarming number of false positives among populations with a low incidence of the AIDS virus; it would arouse suspicion and resistance in those most at risk, who most need to acknowledge the value of restraint. In the states hit hardest by AIDS, California and New York, state and local health officials forged ties with homosexual groups, which early on were already offering AIDS-prevention education. Those connections promoted trust between care-givers and those needing care, as well as encouraging sensible allocations of turf between public and private agencies.

Despite massive publicity about how AIDS is transmitted, nearly one American in four still believes that AIDS can be spread by a handshake, a hug, or a doorknob. Yet despite these misperceptions, the populace has resisted extremists' urgings to paranoia, exercising a remarkable collective restraint. Nowhere is this more evident than in California, the state with the largest number of AIDS cases, where in 1986 and again in 1988 voters defeated measures to exclude AIDS-carriers from schools and work places. Thus far, proposals to discriminate have been rejected. But proposals to protect people with AIDS against discrimination have not been enacted either, despite the urgings of the Watkins Commission and Bayer. The Reagan White House was opposed to such measures, but with George Bush having gingerly offered support, federal nondiscrimination legislation may pass this term.

Bayer is critical of certain strategies of homosexual activists—in opposing even voluntary AIDS testing, for instance—even as he acknowledges the well-grounded fear from which those strategies spring. He repeatedly points out the deficiencies of an approach to AIDS centered entirely on rights; and he seriously considers pro-

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posals that would restrict rights, as by punishing irresponsible at-risk blood donors or by quarantining infected people who knowingly endanger others. While such sanctions are very difficult to impose fairly, it is discourse more than decision that most concerns Bayer. The refusal even to acknowledge these options in public represents "a failure to recognize how public health officials could shape a culture of responsibility by focusing sharply and publicly on the social consequences of personal moral irresponsibility."

Bayer's book emphasizes neither funding nor management, but moral leadership by a tutelary government. A 1987 report prepared by the Office of Technology Assessment, based on interviews with state and local officials, reaches the same conclusion. This is not how we usually think of responding to epidemics—dollars, technology, delivery systems, and legal liability are more familiar concerns—but the implications of AIDS make such leadership necessary.

In Ronald Reagan, the nation had a President who repeatedly used the power of the bully pulpit to exercise moral suasion on matters ranging from school prayer to the *Contras*. But on AIDS President Reagan had almost nothing to say. Never were compassion or social responsibility his themes; such counsel as he offered focused almost exclusively on expanded AIDS testing, the politicians' easy and imperfect panacea. Waiting in the wings, as Shilts and Bayer convincingly detail, was the occasionally discussed and ever-present specter of quarantine.

Historically, quarantine has never been an effective response to highly contagious diseases; but it has manifested a deeply felt need to separate the tainted ill from the respectable well.[7] So too with AIDS. But the Reagan administration never forswore quarantines as irrational, unworkable, and morally unacceptable. Fixated on minimizing the remotest risks of spreading AIDS, the White House never understood the far greater risks to national character posed by the us-versus-them mentality that widespread testing and quarantine would foster.

In August 1987 in Arcadia, Florida, the Ray family's home was torched when the parents insisted on sending their three HIV-positive hemophiliac children to public school. Imagine the bene-

[7]See Allan Brandt, *No Magic Bullet: A Social History of Venereal Disease in the United States Since 1880*, second ed. (New York: Oxford University Press, 1987).

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fits to public tranquility and civic responsibility of a televised presidential fireside talk on how AIDS is and is not transmitted, with the Ray children sitting by that fireside. That talk was never given; indeed, during the first decade of AIDS it was unthinkable. Such was the price exacted by the absence not of a czar but of a moral exemplar.

Things will only be harder in the next decade. *Private Acts, Social Consequences* ends with a series of modest proposals: education "freed from the strictures of moralism" that conveys "not only knowledge but an appreciation of the moral claims imposed by the threat of HIV infection"; universal treatment for drug users that demonstrates "that social neglect is incompatible with a vigorous campaign against AIDS"; needle-provision programs aimed at users who refuse treatment, to "underscore the willingness to place the prevention of HIV transmission above the dictates of convention"; confidential and anonymous screening programs "to advance the public health while simultaneously protecting the privacy of those who come forward"; legislation to defend the social rights of the infected against discrimination, to create a "climate of trust"; and parallel measures to control those who recklessly endanger others, to "establish the moral priority of protecting the public health as a social norm."

Yet it is unclear that we, as a nation, are up to the task. How much harder it will be to mold a popular culture of restraint and responsibility—how much harder it will be to provide the needed support, rather than malign neglect—as AIDS is increasingly ghettoized. More and more, most of those who carry the disease will be neither telegenic young hemophiliacs nor articulate white homosexuals, but black and Hispanic intravenous drug users, their sexual partners, and their progeny. Will the rest of us pay attention to their plight?

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AIDS and the politics of drug lag

DAVID VOGEL

FEW health-and-safety statutes enacted during the last three decades have been as heavily criticized as the Food and Drug Act Amendments of 1962. This legislation, a response to public outrage about the distribution of Thalidomide to pregnant women, made it more expensive and time-consuming for new pharmaceutical products to be approved for sale in the United States. Numerous studies have demonstrated that the 1962 statute, far from safeguarding the health of Americans, has actually impaired it by denying them access to drugs available elsewhere. Yet until recently, the amendments' critics had virtually no political influence. The pharmaceutical industry lobbied for reforming the drug-approval process, but its efforts were thwarted by Ralph Nader's Public Citizen Health Research Group and its influential liberal Democratic allies in Congress—all of whom opposed any relaxation of the strict standards for the approval of new drugs.

Over the last two years, however, the politics of American drug regulation has been transformed. As a result of the AIDS crisis, for the first time the Food and Drug Administration (FDA) is being challenged politically by a group of articulate and well-

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organized people who want to facilitate the approval of new drugs. Organizations defending homosexual rights now criticize the FDA on grounds remarkably similar to those of conservatives in the *Wall Street Journal* and of businessmen in the publications of the Pharmaceutical Manufacturers Association (PMA). Because of the political mobilization of potential consumers of currently unavailable drugs, the advocates of strict drug-approval standards now find themselves on the defensive for the first time in three decades.

Prior to 1962, drugs had only to be proven "safe" before the FDA would allow them to be marketed. After the passage of the 1962 amendments, though, new drugs had to meet an additional test: their manufacturers had to adduce "substantial evidence" that they were also "effective." Previously, a company had been allowed to introduce a new drug unless the FDA officially objected to it. But after 1962 specific FDA approval was required before a drug could be marketed. Finally, the 1962 amendments for the first time gave the FDA jurisdiction over the testing of all new drugs: drug companies had to notify the FDA before new drugs could be tested on humans, and they had to seek the agency's approval before testing a new drug.

The effect of the 1962 amendments

The average cost of developing a new drug increased from $1.3 million in 1960 to $50 million in 1979; the average drug took approximately ten years to get through the FDA's testing process, four times longer than it took before 1962. Not surprisingly, the number of new drugs that were approved declined by two-thirds between 1963 and 1976. The 1962 amendments were not the sole cause of this slowdown in the rate of new drug approval. But according to an influential paper by Sam Peltzman that appeared in 1972, the amendments certainly contributed to the delay. Peltzman's economic analysis of the amendments demonstrated that their costs to the public substantially outweighed their benefits.

In 1973 William Wardell pointed to a "drug lag," demonstrating that between 1962 and 1971 more than three times as many new medicines had been introduced in Great Britain as in the United States: seventy-two drugs were exclusively available in the United Kingdom, compared to twenty-one in the United States. A subsequent study by the General Accounting Office (GAO) confirmed Wardell's finding. Tracking fourteen significant new drugs, the GAO found that all but one were available in Europe before they

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were introduced in the United States; the lag ranged from two months to thirteen years. The GAO also noted that the average FDA approval time exceeded the approval time of every other country except Sweden. During the late 1970s a West German study showed that while the United States remained far and away the leading producer of new drugs, it ranked ninth of the twelve countries surveyed in making new drugs available to its citizens. Between 1961 and 1977, 23.4 percent of all new drugs were discovered in the United States, but only 8 percent were first introduced in this country.

In 1980 Democratic Representative James Scheuer of New York, chairman of a House subcommittee on science and technology, charged that "the FDA is contributing to needless suffering and death for thousands because it is denying them life-saving and life-enhancing drugs that are available abroad far sooner than they are here." He specifically cited the cases of Propranolol (a drug that significantly improved the treatment of hypertension), which was available in the United Kingdom seven years earlier than in the United States, and Adriamysis (the second most widely prescribed cancer medication in the world), which was introduced in Britain in 1971 but not until 1974 in the United States. Scheuer concluded that it was "time for the scientific, medical, and academic communities to work together ... to develop new approaches to drug regulation that ... speed, rather than retard, the introduction of new drug therapies."

Yet despite all the evidence that the "drug lag" caused needless suffering, regulatory policy remained unchanged—apart from the 1983 passage of the Orphan Drug Act, which provided drug firms with special incentives to relieve the plight of those suffering from diseases too rare to make drug development and marketing profitable.

The explanation for this state of affairs is simple: the political costs to the FDA of approving a drug that turned out to be unsafe or ineffective remained far higher than those incurred by delaying the approval of a drug that turned out to be both safe and effective. Those who suffered from the delays in drug approval were not politically organized; in fact, with a handful of exceptions, they were unaware of their own plight. On the other hand, when the FDA approved a drug that turned out to be unsafe or ineffective—as it still did on occasion—the victims were readily identifiable and had powerful allies in Congress and the press. Indeed, throughout

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the 1970s and 1980s FDA officials were repeatedly criticized at congressional hearings for too hastily approving new drugs. As a former FDA commissioner observed: "The message to the agency staff was very clear. Whenever a controversy over a drug is resolved by approval, the agency and the individuals involved will likely be investigated. Whenever a drug is disapproved, no inquiry will be made." A veteran FDA staff member explained the politics of the situation: "No member of Congress will ever get into trouble by asking the FDA why it didn't study something a little bit longer."

The impact of AIDS

In the mid-1980s, however, the political pressures on the FDA changed dramatically because of the emergence and spread of AIDS. Three things made the politics surrounding the medical treatment of AIDS unique. First, unlike virtually all of the diseases whose sufferers had previously been harmed by FDA drug-approval policies, AIDS was fatal. Second, because the disease was new, no existing drugs were available to treat it. Third, and most important, those who suffered from delays in the FDA's approval of drugs to treat AIDS were vocal and politically powerful. Not only did they know who they were, but they were also part of a large, highly sophisticated, and well-organized political network—the homosexual community and its supporters—and their plight commanded widespread public sympathy.

In response to pressures from this new constituency, in 1987 the FDA agreed to modify its usual drug-approval procedures in order to make at least one drug available for the treatment of AIDS. Despite evidence that it was highly toxic, AZT was approved for the treatment of AIDS in only eighteen months, faster than any other drug in FDA history. The agency spent $600,000 to speed up the approval process. Yet its action failed to mollify the homosexual community. Larry Kramer, a founder of the Gay Men's Health Crisis, the largest self-help organization for AIDS patients in the United States, charged that "there is no question on the part of anyone fighting AIDS that the FDA consists of the single most incomprehensible bottleneck in American bureaucratic history—one that is actually prolonging the roll call of death." Ben Schatz, director of the AIDS Civil Rights Project of the National Gay Rights Advocates (a California public-interest law firm), contended that "the FDA is conducting business as usual when they should be

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waging war. There is a lot of ego on the line in the scientific establishment and in the AIDS industry. The decisions are not being made strictly based on human compassion."

The homosexual community's criticism of the FDA was repeated in the report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic. Retired Admiral James D. Watkins, the commission's chairman, worried that "we don't have a system to move drugs rapidly into clinical trials." Noting that many drugs for the treatment of AIDS were currently being reviewed by the FDA, Watkins predicted that unless the drug-approval process were radically changed, "the FDA is going to be in very serious trouble very soon." He proposed that the FDA be given more resources to handle the flood of new applications and that it eliminate placebo-drug trials for AIDS patients, on the grounds that it was unfair to give desperately ill patients sugar pills. The PMA, while expressing some concern about eliminating placebo-controlled trials for AIDS medications, strongly supported the Committee's recommendations. The vice-president of the PMA stated that "Admiral Watkins is calling for more resources to speed the approval of AIDS drugs that coincidentally would speed the approval process of all drugs. We certainly agree with that."

While the FDA was still considering how to respond to the demands of homosexual activists and those who shared their concern about the slow approval of new drugs to treat AIDS, California decided to act on its own. On September 28, 1987, Governor George Deukmejian signed legislation permitting the approval of experimental AIDS drugs and vaccines developed in California. According to state attorney general John Van de Kamp, "The law is a clear statement that—in the midst of a killer epidemic—business as usual in the drug testing process just ain't good enough." While California had already enacted legislation permitting clinical trials of drugs manufactured in California without prior FDA approval, the legislation had been used only for the cancer drug laetrile. The new legislation—passed unanimously by the legislature—required the state's Department of Health Services to handle applications for experimental AIDS drugs.

While state officials predicted that the law would benefit California drug companies, only one firm—ICN Pharmaceutical, the maker of an unapproved drug obtained in Mexico by many AIDS patients—supported the bill. Many California pharmaceutical firms were not able to take advantage of the new state law, either be-

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cause their AIDS drugs were manufactured out of state or because they used out-of-state ingredients. More importantly, many firms were afraid to apply for approval under the law, lest they antagonize the FDA.

Nonetheless, the California decision had considerable national impact. In an editorial entitled, "Rx: Proposition 13," the *Wall Street Journal* stated: "Just as that state was the first to rebel against overtaxation, once again California has taken the lead." A professor at the University of California at San Francisco predicted that the California statute would force Congress and the Administration to reexamine the FDA's policies.

New FDA rules

On June 21, 1987, the FDA enacted new rules designed to expedite the availability of experimental drugs for very sick patients. "The new procedures," the *Wall Street Journal* noted, "represent the sharpest change in 25 years in the way new drugs are approved. " Under the FDA's previous policy, while companies could make experimental drugs available to gravely ill patients, they were not allowed to charge for them until they had been officially approved for sale. Under the commission's new rules, however, companies needed only to show that there was a "reasonable basis" for concluding that the product may be effective, and that it would not expose patients to "significant additional risks." Then, subject to the FDA's approval, they could sell the drug—though only at a price necessary to cover their costs, and without the aid of advertisements.

The impetus for this policy change had come from the Office of Management and Budget, which for more than two years had been pressuring the agency to ease public access to experimental drugs. The FDA, however, was strongly opposed to any change in its procedures. Finally, in March 1988 the recently revived Presidential Task Force on Regulatory Relief headed by Vice-President Bush held a meeting with FDA Commissioner Frank Young at the White House. The Commissioner finally yielded, though he did manage to insert into the new rule a clause that "require[d] a rational basis for believing that the drug may be effective." Publicly, Young described the new procedures as a way "to get breakthrough drugs to the American people, before their safety and effectiveness was [sic] proved.... Where a person is going to

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die in months, and where patient and doctor are informed, we can take a bit more of a risk."

The FDA's new policy pleased no one. The PMA expressed "serious reservations" about it, and the Public Citizen Health Research Group opposed it on the grounds that it circumvented the "effectiveness" requirements of the 1962 amendments. Nor were homosexual groups satisfied. The National Gay Rights Advocates filed suit on behalf of AIDS patients with the Department of Health and Human Services, claiming that the continued withholding of potentially effective drugs violated patients' constitutional rights.

To date, the impact of the agency's experimental-drug policy has been modest. In part because of the reluctance of pharmaceutical firms to open their books to the government, the agency has received only six applications. Of these it has approved two, though with tight restrictions. The agency originally restricted the use of one of these drugs, trimetrexate, which was found effective in treating a common form of pneumonia, to patients who had reacted adversely to the other two drugs approved for the treatment of the disease. But this rule failed to help patients who neither reacted adversely to the available drugs nor were cured by them. It took six months of congressional pressure and the threat of a lawsuit to get the agency to modify its requirement. In February 1989, in a decision described as a "landmark" by AIDS researcher Jerome Groopman, the agency approved the investigational use of aerosol pentamidine, a drug that had proven highly effective in preventing the form of pneumonia that is a leading killer of AIDS patients.

In April 1988 the FDA made another policy change in response to criticism from AIDS patients and their supporters. Young appeared in front of a hostile audience of AIDS patients in Boston to announce that the FDA would now allow people with AIDS to import foreign drugs that were not yet approved for sale in the United States. (The patients, however, were permitted to import only enough of the drugs to treat themselves for about three months, to prevent them from selling the drugs at a profit.) While Young contended that the FDA had significantly quickened the clinical trial of drugs in order to make them more easily available to patients with life-threatening diseases, he added that "in the meantime, I'm not going to steal the hope of AIDS victims by denying them drugs from abroad."

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On July 25, 1988, the Presidential Task Force on Regulatory Relief met again with Young. The Task Force was concerned that the FDA's previous efforts to make experimental drugs available to desperately ill patients were having little impact. Vice-President Bush urged Young "as quickly as possible" to develop "new administrative and legislative proposals" to speed up the availability of new drugs for deadly diseases. A counselor to the Vice-President stated that "we want to vary the regulatory hurdles depending on the seriousness of the disease. Maybe you should lower your standards. You're dealing with a disease that's certain to result in death." While the task force was primarily concerned about the AIDS epidemic and the plight of other terminally ill patients, it also wanted to make it easier for new biotechnology companies to market their products to compete with foreign firms. As a Task Force staff member put it: "It's not just a question of compassion for the terminally ill, but of the viability of new growth companies and of the industry itself."

Further rule revisions

A month later, the Food and Drug Administration began a major reexamination of its elaborate procedures for the testing and marketing of new drugs. The FDA began to explore an Administration proposal, described as "one of the most significant revisions in drug regulation in several years," to suspend the third stage of testing of new drugs for desperately ill patients.

In the first stage, the drug is given to healthy people to test it for toxicity; in the second stage, it is given to a limited number of patients to obtain a preliminary evaluation of its effectiveness as well as its safety. The third stage involves giving the drug to a large number of patients and giving placebos to an equal number, in order to obtain a statistically meaningful measure of the drug's effectiveness. This final stage typically adds two to three years to a drug's approval time; but according to the FDA's own data, only 10 percent of the drugs that successfully complete the second phase fail to complete the third one. Moreover, the average length of time needed for a drug to complete all three stages was longer than the remaining life span of most AIDS patients; it had therefore become increasingly difficult for the FDA to find AIDS patients who were willing to participate in the third stage of its testing procedures. In addition, many homosexual activists argued that giving placebos to victims of AIDS was immoral.

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In its draft proposal, the FDA for the first time officially sanctioned the concept of risk-benefit analysis. It stated:

> The agency recognizes that safety is not absolute [i.e., no drug is free of risk], but must be assessed in light of what condition the drug treats. This is particularly true in the case of drugs to treat life-threatening diseases, where drugs that are quite toxic may nevertheless be considered safe under the circumstances.

On October 20, 1988, the FDA published an interim rule establishing a new procedure for clinically testing new drugs, designed to reduce the time necessary for the approval of promising drugs by one-third to one-half. As expected, the FDA eliminated the lengthy third stage of the traditional clinical trials for promising drugs intended to treat life-threatening or severely debilitating illnesses for which there exists no satisfactory treatment—though it did require companies to continue to monitor the use of such drugs after they were marketed. While prompted by the FDA's slowness in approving AIDS drugs, as well as the opposition of many homosexual organizations to the use of placebos in drug trials, the new policy was also designed to speed the commercial availability of drugs used to treat several other illnesses, including certain cancers, heart diseases, and brain seizures.

This policy change was endorsed by the PMA and greeted enthusiastically by a number of biotechnology firms that hoped it would significantly shorten the time necessary to obtain FDA approval for their products. Others, however, were more skeptical. The head of the American Foundation for AIDS Research doubted that the FDA had the funds or staff to implement the accelerated approval program, and the National Gay and Lesbian Task Force charged that the FDA's announcement represented nothing more than a political ploy to aid Vice-President Bush's presidential campaign. *Regulation* magazine noted that "it is difficult to say how much the FDA's new procedures will improve the drug approval process," adding that "the first test of the FDA's intentions will be how it handles the 11 AIDS treatments now in phase III trials." It concluded that the only way to address the flaws in the drug-approval process was for Congress to revise the 1962 amendments.

Rebellions against regulation

This is not the first time that many consumers have voiced their displeasure with federal regulations designed to protect them. In 1974 millions of motorists rebelled against a National Highway

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Traffic Safety Administration (NHTSA) rule requiring that all new automobiles have seat-belt interlock systems designed to prevent drivers from starting their engines before fastening their seatbelts. By the fall of 1974, more than half the drivers of 1974 model automobiles had either partially or completely disconnected their interlock devices. In October 1974 Congress overwhelmingly approved legislation that forbade the NHTSA from requiring either a sequential warning system with lights and buzzers—which one congressman compared to a Chinese water torture—or an automatic interlock system. Similarly, two years later Congress responded to the complaints of some motorcyclists by forbidding the NHTSA to withhold federal highway-construction funds from states that had not enacted mandatory motorcycle-helmet laws.

Prior to 1987, the most bitter and intense popular opposition to regulatory paternalism involved the FDA's 1977 decision to ban the artificial sweetener saccharin. This decision was based on a Canadian study showing that a diet of 5-percent saccharin significantly increased the incidence of bladder tumors in male rats, particularly in the second generation. The FDA's decision had been required by the provisions of the 1962 Delaney Amendment, which stated that "no additive shall be deemed safe if it is found to induce cancer when ingested by man or animal." Congress was immediately deluged with complaints from consumers who claimed that they needed saccharin because of illness or obesity. The FDA received more than 10,000 letters, and thousands of individuals called to plead with the regulatory agency to reconsider its decision. Congress thereupon overwhelmingly approved legislation forbidding the FDA to restrict the use of saccharin, though it did require that consumers be warned of its potential health hazards.

The criticisms of the federal government made in the uproar over the approval of anti-AIDS drugs resemble those made in these other controversies: in each case large numbers of the intended beneficiaries of a government regulation contended that they could judge their interests better than regulatory officials. But the results of the drug-regulation case are unique. In dealing with the NHTSA regulations, Congress suspended only the specific rules to which vocal segments of the public objected; it made no effort to reexamine the agency's underlying regulatory strategy. Similarly, notwithstanding the fears of many consumer activists, neither Congress nor the Carter administration used the public's opposition to the FDA's ban on saccharin as an opportunity to reexamine the

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scientific rationale of the Delaney Amendment. Instead, since 1977 Congress has periodically simply extended its prohibition on the FDA's ban of this particular food additive.

By contrast, the homosexual community's criticism of the FDA has already stimulated a potentially far-reaching reexamination of the agency's scientific procedures for licensing new drugs against all serious diseases, not only AIDS. Significantly, the FDA's revised rules for new-drug approval do not mention AIDS; they apply to medicines designed to treat all life-threatening diseases. A scientific advisory panel established during the last months of the Reagan administration is currently conducting a major review of FDA procedures for approving drugs for both cancer and AIDS. According to Dr. Gertrude Elion, a member of this panel, AIDS "may be the first break in the armor of federal regulations and I believe it could lead to quicker release for drugs against cancer."

Why has the controversy over AIDS drugs led to a broader assault on regulation than the previous consumer rebellions? First, the Reagan administration, heeding Vice-President Bush's task force, aggressively used the homosexual community's criticisms of the FDA to press for its agenda of regulatory reform. Second, while the business community was largely indifferent to the NHTSA's seat-belt and motorcycle-helmet rules, and the Calorie Control Council was interested only in eliminating the ban on saccharin, many firms, particularly biotechnology companies, have an important financial interest in expediting the approval process for all drugs—not simply for those designed to treat AIDS. Third, unlike its counterparts in the other cases of consumer opposition to regulatory paternalism, the homosexual community wants to do more than change the regulations affecting a particular product; as long as people continue to die of AIDS, it will continue to press the FDA to make drugs more readily available.

Medical reaction

Significantly, the medical community has now joined the growing debate over the nation's drug-approval policies. In an editorial published in the *Journal of the American Medical Association*, Dr. Jere Goyan, who headed the FDA from 1979 to 1981, urged the agency to reexamine "all of the assumptions on which the scientific requirements of the present system are based." He added that "a change in our thinking might enable us to reach decisions on drugs more rapidly at less cost." His position was immediately en-

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dorsed by Dr. Samuel Thier, president of the Institute of Medicine. This receptivity to new thinking is also evident in a survey conducted by the AMA, which reported that 88 percent of doctors favor changing the FDA's drug-approval policies.

AIDS patients are not alone in demanding that the FDA speed up its drug-approval process. Both feminist activists and major family-planning organizations such as the Planned Parenthood Federation of America have recently campaigned to make RU486—a drug developed in Europe that has proven highly effective in terminating pregnancies up to three weeks after a missed menstrual period—available in the United States. This drug has already been approved for use in France, China, Sweden, the Netherlands, and Britain.

The FDA is not the sole cause of this particular "drug lag." Fearful of boycotts by pro-life activists, no major pharmaceutical company has yet committed the considerable financial resources necessary to conduct the tests that might secure FDA approval. But the FDA has added to the uncertainty surrounding this drug by failing to indicate whether it would accept the results of the extensive studies already completed abroad. The FDA has also refused to allow the drug to be imported in limited quantities from France, on the grounds that pregnancy is not "life-threatening"—though American women are permitted to bring the drug back with them from France for their own personal use.

The *Nation* recently published an editorial calling upon pro-choice groups to secure FDA approval of the new drug by imitating the tactics used by homosexual activists—surely the first time that this publication has criticized a regulatory agency for being too reluctant to approve a new commercial technology. *Mother Jones*, another magazine that normally favors the strict enforcement of health and safety regulations, published a lengthy article about the drug in which it explicitly contrasted the "costs" of the side effects of RU486 (it produces a heavier than normal menstrual flow in many women, and a significant number of users experience especially severe cramps) with its "benefits" (it reduces the stigma many women associate with having an abortion and represents a technological end-run around anti-abortion activists, since it deprives the latter of abortion clinics to picket and pictures of aborted fetuses to circulate). This must be the first time that *Mother Jones* has cast its discussion of regulatory policies in cost-benefit terms.

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The significance of the FDA's new drug-approval procedures is not yet clear. To date, only three drugs have been approved for use against AIDS and related diseases. It may well be that the opposition of many FDA scientists to these policy changes, along with proposed cutbacks in the agency's budget, will reduce the significance of this regulatory reform. Fifteen years after Dr. Wardell first noted the existence of a "drug lag," however, it *is* clear that the implications of America's post-1962 drug-approval policies are finally being debated. The political mobilization of the homosexual community may have provided the Reagan administration with one of its few successful regulatory-reform initiatives.

Yet the AIDS crisis also indicates why efforts to revise so many other ill-conceived rules and regulations have proven so frustrating. For the most part, the public remains indifferent to the economic burdens that many protective regulations impose on businesses and consumers. Nor does it seem to care whether particular health and safety regulations make scientific or economic sense. Significant segments of the public are willing to oppose strict health-and-safety regulations only when they perceive a direct and personal benefit from doing so—which seldom happens. For this reason, while the AIDS crisis may have stimulated a major reexamination of the regulation of pharmaceutical products, it hardly augurs a broader review of American regulatory paternalism. The growth of protective regulation occurred in great leaps; regulatory reform is likely to take place only incrementally.

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Borders and quotas: immigration and the affirmative-action state

PETER SKERRY

SINCE THE elimination of national-origins quotas in 1965, the United States has been experiencing a new wave of mass immigration. The prolonged, stalemated debate that culminated in the passage of the Immigration Reform and Control Act of 1986 (IRCA) reflects a national consensus to curtail but not to halt this influx, which currently amounts to about 600,000 legal, and 100,000 to 300,000 or more illegal, immigrants each year.

IRCA's controversial sanctions on hiring undocumented workers have slowed the tide, but not reversed it. During Fiscal Year (FY) 1986, which ended just before President Reagan signed the legislation, a historic high of 1.8 million illegal entrants were apprehended along our southern border. In FY 1988 apprehensions were down to 941,000, approximately the level at the beginning of the decade. But as Professor Wayne Cornelius of the University of California at San Diego reports, documents that establish the legal status of workers (which IRCA requires employers to obtain, but not to authenticate) can be rented on the streets of Southern California for $5 an hour. Thus the flood of illegals is likely to continue, as is the controversy over immigration.

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Today's immigration levels rival those of the decade 1901-1910, when a record 8.8 million newcomers entered the United States. Not surprisingly, comparisons of the two periods figure prominently in the ongoing debate. Proponents argue—or at least assume—that we absorbed huge numbers before and can do so again. Restrictionists counter that we now lack the consensus on basic values that once facilitated the assimilation of immigrants into the American mainstream. Others contrast the diversity of immigrant groups arriving at the turn of the century with the preponderance of Hispanics and Asians among those arriving today. Of these two groups, Hispanics have aroused more anxiety, which is undoubtedly attributable to the much greater number of Hispanics already living here and to their overwhelming presence among illegal immigrants. In any event, recently successful state referenda designating English the official language reflect concerns about our ability to assimilate large numbers of Spanish speakers.

A different set of questions has arisen with regard to the economy. Many people fear that immigrants are either taking the jobs or depressing the wages of American workers. Others argue that today's high-tech economy cannot—or in a competitive world market, should not—absorb as many unskilled workers as the labor-intensive U.S. economy of years past.

Preoccupied with such sociocultural and economic questions, many have ignored another important difference between today's immigration and that at the turn of the century—the political context. Two broad developments are critical: the decline of local party organizations that once helped socialize immigrants into the political process, and the transformation of American politics wrought by post-1960s notions of individual and group rights.

Because of these developments, political authorities today have much less discretion than their predecessors in dealing with social change. This new rigidity is nowhere more evident than with regard to race and ethnicity. Political bosses used to bargain with ethnic-group leaders over balanced tickets, neighborhood services, and patronage jobs. Now politicians must defer to bureaucrats who enforce minority rights through affirmative-action quotas. Even the courts, where justice once meant the careful sorting and balancing of evidence, have come to rely on statistical formulas.

How do such developments affect our ability to respond to the inevitable tensions arising from mass immigration? Do they influence how immigrants today define themselves and their interests?

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Despite much controversy, we seem to have grown accustomed to "counting by race" and "governing by the numbers." But what happens when those numbers are dramatically inflated by massive immigration, much of it illegal?

Comfortable with currently high levels of immigration, both conservatives and liberals have generally been disinclined to take up such questions. Liberals, either out of guilt or obsessive tolerance, have been reluctant to strengthen our borders against immigrants, particularly from the Third World. They tend to see immigrants as victims in need of help and compassion—sentiments that inspired the liberal reforms that have so altered our politics since the 1960s. More self-serving motives also suggest themselves, but given the time it takes immigrants to become citizens and the difficulties of organizing them for political ends, one should not exaggerate—as restrictionists often do—the importance liberals attach to immigrants as potential Democratic voters. On the other hand, mass immigration does benefit liberals by creating large numbers of passive clients for social-welfare programs whose legitimacy and effectiveness have been challenged. In other words, the socioeconomic problems of immigrants may be one solution to the political problems of liberals.

Conservatives, by contrast, have for the most part welcomed immigrants as reinforcements against the erosion of traditional values, and in some cases as ardent anticommunists. Above all, conservatives see immigrants as workers whose energies and ambitions will be channelled into productive economic endeavors. Here again, there is an implicit historical analogy: today's immigrants will be like yesterday's, who (with the notable exception of the Irish) eschewed politics until they advanced economically.

Both perspectives, I believe, are too complacent. In today's post-civil rights political culture, many groups have enormous incentives to depict themselves as suffering some version of the racial oppression experienced historically by blacks. New immigrant groups are further encouraged to do so by the breadth of the civil-rights legislation that Congress passed before the great upsurge of immigration after 1965, and before its sources shifted from Europe to Latin America and Asia. It is a historical accident that the groups that received distinctive protection under civil-rights legislation and judicial rulings were shortly to expand greatly through immigration—legal and illegal. But bestowing benefits intended for black citizens upon newly arrived immigrants has led to confusion

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in area after area of public policy. It distorts the common understanding of the problems immigrants face; complicates our efforts to solve them; encourages immigrants, who come with hopes of advancing themselves in a free society, to see themselves as victims of deprivation and discrimination; and results in policies that are frequently inappropriate. In this article, I consider five policy areas in which these dynamics are at work, and which should give us concern.

Hispanics in higher education

The May 11, 1988, issue of the *Chronicle of Higher Education* reports—in an article entitled "Hispanics, State's Fastest-Growing Minority, Shut Out of Top Positions at U. of California, Leaders Say"—on a two-day meeting of two hundred Hispanic faculty members, administrators, and students from the nine campuses of the University of California. The article repeats the frequent complaint that Hispanics, who make up about 24 percent of California's population, account for only 9.2 percent of the UC system's undergraduates, 6.7 percent of its graduate students, 3.2 percent of its faculty members, and 3.3 percent of its top-level administrators. Eugene Cota-Robles, the system's assistant vice-president for academic affairs, told the *Chronicle*: "Unless Chicanos and Latinos can increase their numbers in the system faster than in the past, the gap between their proportion of the population and their presence in the university will grow in the future."

Similar complaints have been voiced in the national media. Thus a front-page story on Hispanic college enrollments, written by Edward Fiske in the *New York Times* of March 20, 1988, noted that "while the absolute number of Hispanic college students is increasing, the gains are not keeping pace with population increases." The article goes on to cite census data that from 1976 to 1986 the number of Hispanics aged eighteen to twenty-four grew by 62 percent, while the numbers of that group enrolled in college increased only 43 percent. In an earlier *Times* article, Fiske quoted figures indicating that from 1976 to 1985 the percentage of Hispanic high school graduates going on to college actually declined from 35.8 percent to 26.9 percent. In neither article does Fiske consider the relationship between declining rates of Hispanic college enrollment and the arrival of tens of thousands of poorly educated Hispanic immigrants.

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Perhaps the most prestigious effort to focus public attention on Hispanic underrepresentation in higher education has been that of the Commission on Minority Participation in Education and American Life. A joint project of the American Council on Education and the Education Commission of the States, the Commission was chaired by Dr. Frank Rhodes, President of Cornell, and had as honorary co-chairs former Presidents Ford and Carter. Its report, *One-Third of a Nation*, examines data on college-enrollment trends among Hispanic and black youths and concludes: "In the last 10 years, not only have we lost the momentum of earlier minority progress, we have suffered actual reversals in the drive to achieve full equality for minority citizens."

From 1975 to 1985 the percentage of Hispanics aged twenty-four and younger who completed one or more years of college declined from 51 percent to 47 percent. After what Dr. Rhodes describes as "extensive examination of demographic and economic data, review of the relevant research in the field, and consultation with numerous experts," the report cites only one cause for the downward trend in minority college enrollment: reductions in federal student grants. It then calls for "additional federal investment in the nation's children and youth—especially its disadvantaged minority youth."

The report makes no effort to estimate the effect of record levels of Hispanic immigration on rates of Hispanic college enrollment. Dr. Rhodes writes, "Our goal as a nation must be nothing less than to eliminate, as soon as possible, the gaps that mark our racial and ethnic minority population as disadvantaged." Few would challenge this sense of urgency with regard to black youth. But is it appropriate to new immigrants, many of whom arrive with low levels of education and poor command of English? President Rhodes and his Commission colleagues, in their eagerness to place blacks and Hispanics in the same "minority" category, fail to consider that Hispanic youths, a substantial number of whom are either themselves immigrants or the children of recent immigrants, do not feel the same bitterness and deprivation as blacks, whose forebears have been here for generations.

Immigration and school desegregation

The pervasive rhetoric of minority deprivation also distorts our understanding of school segregation. In Houston, the proportion of Hispanics in the public schools almost tripled between 1968 and

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1986, from 13 percent of enrollments to 37 percent. In Los Angeles, the increase has been equally dramatic, from 20 percent in 1968 to 56 percent in 1986. In these and other cities, as The Urban Institute concludes in its study of the impact of immigration on Los Angeles, "the overwhelming majority of the increase is accounted for by the children of recent immigrants from Mexico."

Gary Orfield of the University of Chicago has been monitoring these trends. In his recent report to the National School Boards Association, *Change in the Racial Composition and Segregation of Large School Districts, 1967-1986*, Professor Orfield observes:

> Overall, the data show no significant progress on the desegregation of black students in urban districts since the mid-1970s, and severe increases in racial isolation in some areas.... Hispanics, on the other hand, have been continually moving toward increasing isolation.

Elaborating on the Hispanic data, Orfield later notes: "Unless these long-established and powerfully consistent trends are reversed, Hispanics will face intense segregation, particularly the lower income Hispanics who reside in central cities." He concludes:

> The clear trends in large district enrollments mean that the ultimate resolution of the city-suburban issue by mandatory or voluntary means, or, perhaps in the very long run, through housing integration, will decide whether there will be integration for millions of segregated minority students in a society with a constantly shrinking white majority and powerful evidence of inequality associated with segregated education.

But is "Hispanic" a category analogous to "black" or "white"? Do concentrations of Hispanics in schools mean the same thing as concentrations of blacks? Despite a growing tendency to use the term in tandem with "black," "Hispanic" is a cultural or ethnic designation, not a racial classification. Thus the census makes separate counts of race and Hispanic origin. And in 1980 only 3 percent of Hispanics identified themselves as "black," and 41 percent as "other." Fully 56 percent identified themselves as "white."

Other data similarly indicate that Hispanics, far from experiencing "segregation," are simply in the early stages of ethnic assimilation. Orfield's colleagues at the University of Chicago, sociologists Douglas Massey and Nancy Denton, have done extensive research on residential patterns and demonstrate that Hispanics move to the suburbs much more easily than blacks:

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> Not only are levels of black suburbanization quite low, but they are unrelated to any of the explanatory variables we examined. Hispanic and Asian suburbanization, in contrast, are explained largely by objective indicators of socioeconomic status and acculturation.... With rising socioeconomic status, progressive suburbanization of these two groups should occur; their levels of suburbanization are already considerably above that of blacks.

And as Massey and Denton observe elsewhere:

> Large Hispanic and Asian enclaves do exist in many urban areas, but they do not appear to be closed environments from which there is little social or spatial mobility.
>
> In contrast, we find a clear persistence of strong barriers to residential integration among blacks....

The term "segregation," of course, implies a prolonged period of racial oppression or exclusion. Consistent with such a perspective, Orfield refers to Hispanic residential patterns as "long-established." But are they? The trends identified by Orfield are driven, as both The Urban Institute's and Massey and Denton's research make clear, by the huge influx of Hispanic immigrants into our nation's cities. Yet the phrase "Hispanic immigrant" never appears in Orfield's article. Nor does immigration figure at all in his analysis of school segregation.

The crucial question is whether the pattern Orfield discerns among Hispanic schoolchildren is a permanent phenomenon or a transitional phase in the assimilation process. What Orfield insists upon calling racial segregation is more accurately described as the ethnic concentration typical of new immigrants. Demographers Frank Bean and Marta Tienda argue in their exhaustive quantitative study *The Hispanic Population of the United States* that Hispanics—Mexicans and Cubans in particular—exhibit a pattern of "voluntary segregation." Or as Hispanic activist-scholar Harry Pachon and his colleague sociologist Joan Moore put it: "[T]here are strong indications that Hispanic [residential] patterns are unlike the black-white pattern and more closely resemble those of European immigrants."

The ethnographic evidence indicates that Hispanics view their neighborhoods as the natural and more or less desirable outcome of the confluence of economic necessities and individual preferences. Although at times the objects of shame as well as pride, barrios bear less of a stigma for Hispanics than ghettos do for blacks. There is certainly no evidence that Hispanics favor busing or other

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such desegregation efforts. Indeed, their much praised close-knit family life means that Hispanics, like their white ethnic counterparts in the cities of the Midwest and Northeast, are reluctant to send their children off to schools far from their homes and neighborhoods. With the exception of a few activists intent on forging an unlikely coalition with blacks, Hispanics have not demanded "desegregation," but have called instead for relief of overcrowded schools and increased education funding.

Although busing is unlikely to reappear on the national agenda, Orfield's work still deserves scrutiny: it reflects a broader tendency, also evident in the Rhodes Commission, to cast the inevitable problems faced by immigrants today in terms drawn from the history of discrimination and segregation experienced by blacks. But the evidence defies the exercise. Whatever the merits of busing as a remedy for black segregation, it clearly makes no sense in the case of recently arrived Hispanic immigrants.

Immigration and public-sector employment

In January 1988 the Los Angeles County Office of Affirmative Action Compliance issued a report charging that "Hispanics and American Indians continue to be underrepresented significantly in the overall [county] workforce." In 1987 Hispanics constituted 27.6 percent of the county population (according to the 1980 census), but only 18.3 percent of its work force. With regard to blacks, the report deftly avoids the term "overrepresentation," but points out that they constitute 30.5 percent of the work force and only 12.6 percent of the population. The report then recommends:

> To keep pace with Hispanic and American Indian projected County population increases in 1992, the County must set aggressive hiring goals and employ additional resources over the next 5 years. The current underrepresented levels of these 2 groups will be seriously compounded come 1990 unless significant gains are made over the next 2 years.

Over the protests of black county employees, in July 1988 the Los Angeles County Board of Supervisors unanimously adopted the controversial report and committed itself to the concept of "population parity," which, under county ordinance, ties affirmative-action goals to minority-group population figures from the decennial census.

Left unstated by the Supervisors is by what means—and, of course, at whose expense—these goals are to be met. The Super-

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visors are relying on nearly decade-old 1980 data, and the difficulties they face achieving Hispanic population parity will certainly increase after the 1990 census. The Black Employees Association (BEA) has argued that overall county employment levels obscure the fact that blacks are concentrated in lower-echelon jobs. The BEA has also complained that the figures used to calculate Hispanic parity are inflated by large numbers of illegal aliens.

One black leader was quoted in the *Los Angeles Times* (July 13, 1988): "[W]e support affirmative action but we do not support preferential treatment." Other black and Hispanic leaders, clinging to the notion of a "Third World coalition," attempt to cover over their differences by pointing to "the real culprits . . . white males." Ironically, the data reveal that county employment for whites is far below population parity: 40.5 percent of the county's work force is white, compared with 52.4 percent of its population.

The Los Angeles Police Department has been prodded in the same direction as the county and has adopted a goal of 30-percent Hispanic representation for each police-academy class. In Sacramento, legislators charging that Hispanics are underrepresented in the state civil service have convinced their colleagues to create a task force to address the problem. Yet in all these arenas, with the exception of protests by threatened blacks, there are few challenges to the unexamined assumption that Hispanics, whose numbers are steadily increasing from immigration, need or merit affirmative-action protection.

Voting rights and rotten boroughs

The Voting Rights Act of 1965, as amended in 1975 and again in 1982, has two triggers for "language minorities," defined by Congress to include Asian-Americans as well as "persons of Spanish heritage." Section 4 of the Act is triggered in jurisdictions where on November 1, 1972, more than 5 percent of voting-age citizens were members of a single language minority and fewer than 50 percent of eligible citizens voted in the 1972 presidential election. Not only must such jurisdictions conduct bilingual elections; they must also submit for preclearance, or prior federal review, all electoral changes (such as polling-place relocations, municipal annexations, and redistrictings) to determine discriminatory impacts.

It is worth noting that both prongs of this Section 4 preclearance trigger now specify "citizens"; the original language of the

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1965 Act, concerned primarily with the disenfranchisement of blacks, referred to "persons," who were presumed to be citizens. Recognizing that not all members of language-minority groups are citizens, Congress has refined its voting-rights tools.

But counting citizens is problematic. The calculations mandated by Section 4 rely on self-reported census data that include substantial numbers of illegal aliens claiming to be citizens. The Census Bureau estimates that in 1980 its official population count included more than two million illegal aliens. The Bureau further estimates that in 1980 843,000 aliens incorrectly claimed to be naturalized citizens.

Because illegal aliens are geographically concentrated (about one-third of those counted in 1980 reside in Los Angeles County, and one-half reside in California), such biased census data could place a jurisdiction under Section 4 by simultaneously driving its percentage of language-minority citizens above the 5-percent threshold and driving its percentage of citizens voting below the 50-percent mark. Since Section 4 relies on 1972 data, which presumably include few aliens, such errors have apparently not occurred. But the bias in citizenship data may come into play when Congress considers extension of the Voting Rights Act.

These concerns also apply to Section 203 of the Act, which covers jurisdictions in which more than 5 percent of voting-age citizens belong to a single language minority and "do not speak or understand English adequately enough to participate in the electoral process." Such jurisdictions must provide bilingual election materials, but are not required to submit electoral changes for onerous federal preclearance.

Unlike the Section 4 trigger, both prongs of Section 203 rely on current data, so the problems of identifying language-minority citizens by means of self-reported census data are of immediate concern. Arguably, however, the tendency of illegal aliens to misrepresent their citizenship status is counterbalanced by their tendency to exaggerate their claims to facility with English. This dynamic might explain why Los Angeles, despite its huge Hispanic population, is not covered by Section 203. But we don't know for certain, because no one has attempted to answer the questions posed here. For the same reason, we don't know how many jurisdictions have been brought under Section 203 by biased data. Certainly in 1992, when Congress considers renewal of this section and census data

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will reflect the huge influx of the past decade, these nascent problems may become more serious.

Less arcane in its workings, and certainly more sweeping in its impact, is Section 2 of the Voting Rights Act. As Abigail Thernstrom demonstrates in her recent book *Whose Votes Count?*, Section 2, as revised by Congress in 1982 and subsequently interpreted by the courts, now requires jurisdictions with racial or language minorities nationwide to create single-member districts assuring the election of minority officeholders in proportion to each group's share of the total population. Unlike calculations under Sections 4 and 203, such redistricting efforts do not attempt to exclude noncitizens: they rely on the census figures used for congressional reapportionment, which the Constitution requires to include "persons," not just citizens. As a result, districts created to assure the election of Hispanic officeholders invariably include disproportionately large numbers of noncitizens and illegal aliens.

These factors help explain why such districts have extremely low levels of voter participation. For example, Los Angeles's 1st councilmanic district, created in 1986 under pressure from a Justice Department lawsuit, is about 69 percent Hispanic. Of the district's 234,000 residents, only 36,000 are registered voters. Not only is this the lowest registration level of any district in the city, but the Mexican-American woman holding the seat won in an election for which only 12,000 voters turned out. In one precinct, only seventeen people went to the polls.

To be sure, this was a special election for which voter interest would presumably be low. Still, it was hardly an isolated incident. In the State Assembly districts carved out of Los Angeles barrios by the 1980 redistricting registration and turnout have been among the lowest in California. In November 1986—a typical election—24,726 votes were cast in East Los Angeles's 56th Assembly district, compared with an average turnout of 86,010 in Assembly districts across the state.

According to the California Poll, Hispanics accounted for 22 percent of the state's population in the mid-1980s, but only 7 percent of its actual voters. Such low levels of political participation are attributable to factors other than noncitizenship, including youth and low socioeconomic status. Yet the California data reveal that while 20 percent of the gap between Hispanics' share of the total population and their share of the electorate is due to their low average age, 47 percent is attributable to noncitizenship.

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Large concentrations of Hispanic noncitizens mean that the creation of predominantly Hispanic districts gives disproportionate weight to votes cast by Hispanic citizens in those districts, an affront to the one-man-one-vote principle that has gone completely unnoted. At the same time, such districts exaggerate the problem of low Hispanic turnouts and reinforce the stereotype that Hispanics are politically passive and indifferent. Finally, the creation of reliably Hispanic districts with relatively few voters benefits Hispanic officeholders more than those they claim to represent. In essence, we are creating rotten boroughs, with politicians unaccountable to a large and growing number of "constituents" unable to vote. In such districts, Hispanic officeholders are more likely to be responsive to the politicians who created their districts than to the people who live in them. In California at least, the ironic result has been the election of liberal Mexican-American Democrats who routinely criticize the system's lack of responsiveness to their group.

Congressional reapportionment

Mass immigration is also having substantial, though widely overlooked, effects on congressional reapportionment. In a recent study for the Center for Immigration Studies, demographer Leon Bouvier estimates that from 1950 to 1980 the six states experiencing the greatest influx of foreign-born immigrants (California, New York, Texas, Florida, New Jersey, and Illinois) gained sixteen more congressional seats than they would otherwise have had. California alone owes six of the fifteen seats it gained during this period to immigrants and their offspring, and Florida owes two of its eleven additional seats to immigration. While New York lost nine seats during this period, it retained six others that it would have lost in the absence of immigration. Georgia, on the other hand, received few immigrants, and although its population grew nearly 17 percent faster than the national average from 1950 to 1980, it gained only one congressional seat during that period.

Bouvier also projects the likely effects of immigration on reapportionment from 1980 to 2010, and points out that low native fertility rates will augment the impact of continued record levels of immigration. He calculates that without immigration the six key states would see their present congressional delegations grow from 161 to 172 total members. With immigration approximately at the current rate (which he conservatively estimates at 750,000 immi-

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grants per year), Bouvier estimates that the six states would increase their total congressional seats to 184 by 2010. Under this scenario, California would increase its congressional delegation from its present forty-five to sixty-one; fully 40 percent of the thirty-one seats the state would have gained from 1950 to 2010 would be attributable to foreign-born immigrants and their children.

Bouvier himself admits that his calculations are "approximate at best," and his prospective estimates must be viewed even more cautiously than his retrospective efforts. His calculations are based, for example, on rather conservative Census Bureau population projections that assume that the fertility rates of immigrants will be as low as those of native Americans. On the other hand, Bouvier draws no distinctions between legal and illegal immigrants, and he makes the dubious assumption that all illegals will be accurately counted by the census and included in reapportionment calculations. Nevertheless, Bouvier's exercise is useful because it is one of the few attempts to assess the overall impact of legal and illegal immigrants—and their offspring—on congressional reapportionment.

Several Congressmen have asked the Congressional Research Service (CRS) to look at the effect of illegal immigration on reapportionment. And in a June 8, 1988, report CRS calculates that California and New York each came out of the 1980 reapportionment with one more congressional seat than they would otherwise have had, due to their illegal-alien populations. This calculation is based on what the Census Bureau regards as a conservative estimate of two million illegals residing in the United States in 1980, so it is a minimal figure.

CRS also estimates that under the 1990 reapportionment, the presence of illegal aliens could mean one or more additional seats for California, and one each for Texas and New York—at the possible expense of fourteen different states. Because reapportionment calculations are complicated and the assignment of congressional seats can change with a shift of a few hundred people, such projections are necessarily tentative. Still, the impact of illegal aliens on the 1990 reapportionment will be evident.

Surprisingly, this nation of immigrants has never had to confront this issue quite so directly as now. Until the restrictive legislation of the 1920s, the United States had virtually open borders, and the phrase "illegal alien" had little practical meaning. The late

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nineteenth and early twentieth centuries saw charges that "unnaturalized aliens" biased reapportionment in favor of states with big cities. Such disputes were typically sidestepped by means of a familiar political device: addition. To ensure that no state gained at the expense of any others, the total number of House seats was increased with each reapportionment. In 1880 Congress accorded itself 332 seats; in 1890, 357 seats; in 1900, 391; and in 1910, 435. Concerns about size and manageability led Congress in 1911 to freeze the total number of House seats at its current ceiling of 435.

In 1920, when that ceiling was to be first implemented, reapportionment got caught up in the controversy occasioned by that year's census results, which revealed for the first time that most Americans lived in urban areas. For a nation steeped in what Richard Hofstadter called "the agrarian myth," and already preoccupied with the momentous social and cultural changes precipitated by World War I, this finding was not welcome. Anxieties about cities full of immigrants, whose numbers began climbing again as soon as the war was over, helped fuel resistance to reapportionment. As the *Congressional Quarterly's Guide to Congress* notes, "Rural legislators immediately mounted an attack on the census results and succeeded in postponing reapportionment legislation for almost a decade."

For the first and only time in its history, Congress failed to reapportion itself. When it finally got around to doing the job after the 1930 census, immigration had been cut off by the Depression and the restrictive legislation of the 1920s. Indeed, immigration restriction and the refusal to pass a reapportionment bill, according to historian Margo J. Anderson's recent study, *The American Census: A Social History*, were part of a two-pronged holding action sustained thoughout the 1920s by the Republican-controlled Congress against the cities and their immigrant workers.

The compromise eventually struck with those rural interests hinged on malapportioned legislative districts. As Anderson puts it:

> [T]he ultimate "solution" to the reapportionment crisis created by the growing power of the urban population of the nation was to reapportion congressional seats among the states but allow the states themselves to malapportion those seats within the states.

Yet even this bit of play in the system was eliminated in the 1960s with the Supreme Court's one-man-one-vote decisions, whose requirements of strict equality of representation started us down the present path of rigidly administered outcomes. As a result, we now

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lack the political buffers available to earlier generations of Americans coping with mass immigration.

Should anything be done?

The assignment of a few extra congressional seats to California and Texas on the basis of illegal-alien populations hardly augurs the end of the Republic. In the nineteenth century, after all, aliens were routinely registered and voted by local party organizations. But in today's regime, where population figures influence many funding and affirmative-action results, we have reason to pause and ponder.

One drastic—and unwise—proposal comes from Yale professors Peter Schuck and Rogers Smith. In their recent book *Citizenship Without Consent: Illegal Aliens in the American Polity*, they urge an end to our practice of birthright citizenship, which assures anyone born here of automatic U.S. citizenship. Instead, Schuck and Smith advocate granting the option of citizenship exclusively to the offspring of U.S. citizens and legal resident aliens. At a time when the obligations as well as the rights of citizens are being emphasized—in proposals ranging from welfare work requirements to national-service programs—such an effort to make citizenship the result more of conscious choice than of geographical or biological accident has much appeal. But it is not clear that the Schuck-Smith proposal would curtail the influx of illegal immigrants, whose primary goal is not citizenship but employment. Implementing such a proposal might well result in an ever-expanding, self-perpetuating pool of illegal aliens consigned to a permanent inferior status.

Another approach would be to accept the inevitability of illegal immigration, but to limit its political effects. For example, in response to the reapportionment issue discussed earlier, forty-two members of Congress and the states of Alabama, Pennsylvania, and Kansas recently joined with the Federation of Americans for Immigration Reform (FAIR), the principal immigration-restriction lobby, in a lawsuit challenging the inclusion of illegal aliens in the 1990 census. A federal district court dismissed this suit on procedural grounds; FAIR's parallel effort before the 1980 reapportionment was similarly dispatched.

But the inclusion of illegal aliens in the census is a less visible problem than the exclusion of some residents, which results in a census undercount. While the Census Bureau counted

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more than two million illegals in 1980, that same year it overlooked—by its own calculations—more than 3.2 million people, disproportionately blacks and Hispanics. Despite efforts to improve coverage, a similar undercount is widely regarded as inevitable in the next census, already resulting in pressure to adjust the 1990 totals upward. Big-city mayors and congressmen have joined black and Hispanic spokesmen in emphasizing the critical connection between accurate population counts and the distribution of federal funds. The Reagan administration resisted all such pressure, prompting the resignation of Dr. Barbara Bailar, associate director for research and a twenty-nine-year Census Bureau veteran, who asserted that the administration's position was "dressed up in technical language, but was a purely political decision."

The constituency to eliminate illegal aliens from the 1990 census has no such visibility or clout. Census professionals are hostile to all such proposals, which they regard as fundamentally at odds with the Bureau's historic mission to count everyone. As the U.S. District Court for the District of Columbia noted when rejecting FAIR's 1980 census challenge:

> The Census Bureau has always attempted to count every person residing in a state on census day, and the population base for purposes of reapportionment has always included all persons, including aliens both lawfully and unlawfully within our borders.

The 1980 census long form merely asked if respondents were citizens or aliens. Census professionals fear that asking direct questions about legal status would jeopardize the high level of cooperation on which their efforts critically depend.

Those arguing for the inclusion of illegal aliens in the census also point to the constitutional mandate to enumerate "persons"—not merely citizens or legal aliens—every ten years for the purpose of reapportioning Congress. The first counts, starting in 1790, included those ineligible to vote at the time: women, the propertyless, and slaves.

On a practical level, the extra political weight and benefits that some districts reap from the counting of illegal aliens in the census is roughly balanced by the undercount of blacks and Hispanics that often occurs in the same districts. Taking all these factors into consideration, leaving the census count as it is probably makes the most sense.

Affirmative-action protection for Hispanics and other immigrants—legal or illegal—is another matter. Whatever the

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merits of affirmative action for black Americans, it makes little sense to extend its benefits to those whose claims on the nation's conscience are far less cogent—and who come here expecting no special help. Nevertheless, excluding Hispanics, or Asians, from affirmative action will not be easy. In the Voting Rights Act, and in federal legislation and regulations giving benefits to minority contractors, a form of affirmative action is already enshrined in law. Blacks, whose leaders strenuously but unsuccessfully resisted sharing the Voting Rights Act with Hispanics, will not need to be convinced of the wisdom of restricting affirmative action to themselves. And as blacks feel increasingly squeezed by the kinds of redistricting and employment controversies described here, their opposition to Hispanic participation in affirmative action can be expected to increase.

On the other hand, one suspects that blacks will not be joined by their white liberal allies, who will probably see efforts to exclude any groups from affirmative-action protection as an attack on affirmative action generally. Hispanic leaders in particular have grown dependent on such protection and will similarly reject all such proposals. And as the number of Hispanics benefiting from such programs increases, the constituency for affirmative action will of course grow.

Despite the obstacles posed by our institutions and political culture, the evidence indicates that immigrants today are managing to assimilate into the social and economic mainstream, and contributing enormously to the commonweal. But these processes are slowed—and the tensions inevitably accompanying mass immigration exacerbated—by the rigid, formulaic logic of affirmative action. With no end in sight to the causes of the current influx, and with the difficulty of withdrawing benefits once they have been granted, the real test of the affirmative-action state may be yet to come. At that point, we may be forced to adopt a more restrictive immigration policy.

Right now, one thing is clear. To do nothing is to ignore fundamental changes in our political system, and to persist in the wrong-headed notion that the course of today's immigration will simply parallel yesterday's. We are at present peculiarly reluctant to address such issues. But if we do not, then we acquiesce in the rewriting of the social compact this nation has had with immigrants since its founding.

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The Fairness Doctrine and the First Amendment

THOMAS W. HAZLETT

THE FAIRNESS DOCTRINE was cooked up by the regulatory chefs at the Federal Communications Commission (FCC) in 1949. The Doctrine required radio and television licensees "to provide coverage of vitally important controversial issues of interest to the community ... and ... a reasonable opportunity for the presentation of contrasting viewpoints on such issues." Yet in recent months the Doctrine itself has proven to be just such an issue.

Several years ago, the FCC's policymakers, newly converted to the gospel of deregulation, refused to defend the Fairness Doctrine in pending federal litigation. In effect, they asked a federal district court to find that their own regulations violated the First Amendment. The court's response was, essentially, "You created it; you kill it." So in August 1987 the FCC did.

Outraged that broadcasters could now exploit their license privileges to sway the public in an unregulated fashion, Senator Ernest

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Hollings (D.-S.C.) moved quickly to counter the FCC by securing passage of a bill that would have reinstated the Doctrine in September 1987. When President Reagan vetoed it, Hollings responded by proposing a tax on all sales of radio and television broadcasting licenses, including a penalty tax on those licensees deemed insufficiently "fair." The provision very nearly found its way into the midnight budget compromise between the White House and Congress, both of which were struggling to avert a panic in the wake of the October 1987 stock-market crash. Hollings's provision was withdrawn upon the Administration's threat to veto it a second time.[1]

To Hollings, "fairness" apparently meant taming any forces that would threaten to visit disagreeable views on a defenseless public. Hence, in a deal with his colleague Edward Kennedy (D.-Mass.), Hollings revoked a ruling that permitted Australian media entrepreneur Rupert Murdoch to own both Boston television station WXFT and the *Boston Herald-American*. The scheme was never intended to become public, but Hollings has now openly admitted that it was an attempt to sink the conservative *Herald-American* as a favor to Senator Kennedy. He has not, however, disavowed the use of federal power to silence opponents, even after a U.S. Circuit Court of Appeals ruled in March 1988 that his amendment unconstitutionally abridged the freedom of speech. Indeed, Hollings complained that the court "has arrested the policeman on the beat, while the culprit has gone free."

When "fairness" is unfair

Yet using any arbitrary standard to license the press—which radio and television surely are in an age when most Americans do not read newspapers—is sure to cause great political mischief, even if the standard seems as unexceptionable as "fairness." Fairness, after all, is in the eye of the beholder, and government officials make very self-interested beholders. As Justice John Paul Stevens put it, "The court jester who mocks the king must choose his words with great care."

The more subjective the standard, of course, the more nervous the supplicant. The FCC has never clearly defined the fairness re-

[1]Since then, congressional leaders have repeatedly stated their intention to enact a Fairness Doctrine upon President Reagan's departure, and such legislation is currently moving through Congress. President Bush has indicated that he would likely veto such a measure.

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quirement for license holders, preferring instead to cling to a case-by-case method. Indeed, federal radio licensing began in the 1920s with the vaguest standard of assignment the courts would allow: rights were to be awarded to whoever satisfied "public convenience, interest, or necessity." In the early days of radio, Secretary of Commerce Herbert Hoover found the views of labor organizations to be less in the public interest than those of businessmen, and he distributed valuable spectrum rights accordingly. Franklin Roosevelt thought it eminently fair to forbid all newspaper publishers to own radio stations (thus attempting the first "cross-ownership" restrictions), on the ground that they were, as a class, unfairly hostile to the New Deal. When provocative conservative editorials sprang up on the airwaves of Yankee Radio outlets throughout New England in 1937, the FCC came within an eyelash of ending the network's life. The network was spared only after promising to give up editorializing altogether—a condition that was soon enforced as the FCC-set industry standard. The Fairness Doctrine had its ironic origins in a 1949 Truman administration plan to restore a limited measure of editorial controversy to radio programming.

Whatever Republicans may have thought about the ends of the New Deal, they were not averse to using its regulatory means. The Eisenhower administration used a "public interest" standard to award a mysteriously high proportion of television broadcasting licenses to GOP businessmen. Lucas A. Powe, Jr., notes that of nine newspapers awarded television licenses in comparative hearings under the Eisenhower administration, "not a single one had supported Adlai Stevenson in 1952, and only the *Miami Daily News* [which had co-ventured its application with the Republican *Miami Herald*] was a Democratic newspaper.... Of the fourteen losing newspapers, nine were supporters of the Democratic Party. Two of the losers had supported Eisenhower but were in a contest with another newspaper that also supported Eisenhower. Three others, although also Eisenhower supporters, classified themselves as politically independent."

The Nixon administration had broader concerns than simple patronage. Hence Spiro T. Agnew went to great lengths to assure the Silent Majority that the networks were to be monitored very, very closely. License harassment of stations considered unfriendly to the Administration became a regular item on the agenda at White House policy meetings; during one thirty-day period there

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were twenty-one specific presidential directives asking staffers to consider responses to unfair news reporting. The mischievous *Washington Post* even stood to suffer because of its cross-ownership of licensed broadcast properties, but in the event the *Post* got Nixon before Nixon got the *Post*. The bipartisan *coup de grâce* came when the highly rated but politically liberal "Smothers Brothers Comedy Hour" offended Rhode Island's Democratic senator Frank Pastore, the chairman of the FCC's oversight committee, by mockingly bestowing upon him the "Flying Fickle Finger of Fate" award. The Senator was unamused, and CBS quickly cancelled the profitable show.

While freedom of speech and the press has traditionally meant the absence of state controls, the rationale for broadcast regulation is that freedom permits bias. Public-spirited regulation is thought to be necessary to ensure equal media access for those on all sides of controversies, and to promote equal treatment of political candidates—in short, to mitigate the possible one-sidedness of the electronic publisher. Of course there are grotesquely unfair newscasts, and even wildly irresponsible entertainment programs. The relevant question, however, is whether political regulation will tend to reduce inequity, or exacerbate bias and kill important news sources altogether. Regulation moves the "fairness" programming decision away from those who compete for audiences to those who have secured bureaucratic power within a federal agency. It requires a very large leap of faith to believe that this substitution will enhance consumer choice or improve the character of our democracy.

Why regulate broadcasting?

The legal premise for licensing broadcasters on the fairness (or "public trusteeship") model is the brainchild of Supreme Court justice Felix Frankfurter. In his 1943 *NBC* v. *U.S.* majority opinion, Frankfurter gave the FCC wide latitude to regulate broadcasters in the "public interest," on the grounds that frequencies were physically scarce and—in the absence of government licensing—would yield no speech whatsoever. Left to the private marketplace, the opinion held, the airwaves would descend into "a cacophony of competing voices," each drowning out the other, as static interference dominated electronic speech. Indeed, Frankfurter asserted, prior to the Radio Act of 1927 commercial broadcasters had sunk into just this electromagnetic swamp, rescued only by farsighted policymakers in Congress. As speech had been made

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possible by the federal government, so its content could be regulated by the federal government.

Yet Frankfurter's rationale for broadcast regulation is illogical and historically inaccurate. Commercial radio broadcasting began in the U.S. in November 1920, and though more than five hundred stations were active by 1923, the domestic broadcast market was in good shape through July 1926. First-come, first-served claims had been established in fairly orderly fashion and were well respected, until a federal court and the U.S. Attorney General upset the apple cart in 1926 by revoking the Commerce Department's ability to enforce exclusive rights in "the ether." The licensing scheme that Congress enacted the following year served the interests of political incumbents by placing authority over valuable broadcasting resources in the political sphere. It also helped major radio broadcasters by restricting band width, fixing all large stations on existing (preferential) assignments, and creating solid entry barriers. In short, the scheme brought political fun and economic profit, but no key player was confused about the premise: licensing was politically expedient, but not technologically necessary.

It was well understood that interference in the ether could be eliminated by the simple administrative act of demarcating broadcasting rights. Indeed, the courts had seen that judicial enforcement of property rights to broadcast frequencies was a viable alternative to federal licensing, and they were moving to provide it. It was mostly fear of private solutions to the spectrum-assignment problem that led Congress and the White House to nationalize the airwaves in the 1927 legislation, thus establishing political control over a sure-to-be important medium. Instead of selling broadcast-spectrum rights, Congress and the FCC chose to assign them without dollar payment, while using the assignment power to help friends, punish enemies, and promote favored socioeconomic views.

The Frankfurter argument is not only bad history, but bad logic as well. The government need not assign frequencies in order to be a good broadcasting-traffic cop; defining rights to them is enough. Once legal rights are established, they may be assigned by market forces—as in the daily auction on Wall Street in which broadcast frequencies are assigned and reassigned, just as they have been since the early 1920s. The interference problem is solved, not by the distribution of licenses, but by the courts and the enforcement arm of the FCC.

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In this sense the newspaper market is similar to the broadcast market. Failure to enforce property rights could easily cause as much chaos for newspapers as it did for broadcasters, if newspapers could safely steal their rivals' columns and if customers could routinely steal newspapers. As Robert Bork concluded in an important Circuit Court decision:

> [I]t is certainly true that broadcast frequencies are scarce, but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another.

In fact, Frankfurter's "physical scarcity" rationale for overlooking the First Amendment is suspect on its face. Daily newspapers have no obligation of "fairness" despite commonly possessing monopoly power and immense political and financial influence in their regions. If the *Miami Herald*, delivered to 37 percent of all households in its region, escapes any public-service obligation,[2] why should each of a dozen local television stations and forty local radio stations face the prospect of losing their licenses when disagreements over fairness arise? Indeed, the vast majority of serious Fairness Doctrine cases arose over radio stations, which typically vie in highly competitive markets; television stations, which face less competitive conditions, almost invariably decided to get rich blandly rather than air controversy and risk license-renewal challenges from competitors or aggrieved opponents. In effect, the Fairness Doctrine enforced a cartel of mediocrity. As Justice Douglas observed in 1973:

> [T]he regime of federal supervision under the Fairness Doctrine is contrary to our constitutional mandate and makes the broadcast licensee an easy victim of political pressures and reduces him to a timid or submissive segment of the press whose measure of the public interest will now be echoes of the dominant political voice that emerges after every election.

[2]That newspapers are under no obligation to be fair—no matter what their economic power, market share, or political influence—was firmly decided in *Miami Herald* v. *Tornillo* (1974). The Supreme Court unanimously held unconstitutional a 1913 Florida statute mandating that newspapers give political candidates a right to reply to personal attack.

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Real controversy causes complaints virtually by definition, and the effect is felt at license-renewal hearings. (Licenses must be renewed every seven years, up recently from every three.) While the Fairness Doctrine mandated that stations cover important topics of controversy, stations had to respond only to public complaints.[3] But no one ever complains about blandness; people file protests when incensed, not when drowsy.[4] For their part, station managers and owners prefer news editors and reporters who cost them little in contentious renewal proceedings. The economics are straightforward: when you tax controversy, you tend to get less of it.

The First Amendment makes little sense if interpreted as a rule barring state regulation except when regulators believe that they can do good. There will always be instances in which the freedom of speech or of the press is abused in the sense that our democratic institutions and even our souls (not to mention our peace of mind) would be better off without some quantity of nonsense. But the First Amendment comes down against any case-by-case judgments, on the theory that state regulation of the press is more dangerous than nonsense. The Founders feared regulation not because it could never make democratic life better, but because it could occasionally fail so abusively.

The Founders were under no illusions about the objectivity of the unregulated press; indeed, the newspapers of their day make Rupert Murdoch look respectable. Senator Robert Packwood, the most outspoken congressional proponent of extending First Amendment protections to electronic media, notes that when the country was founded, "there were only eight daily newspapers—*that* was scarcity." Nonetheless, the Founders wanted to protect them, despite the fact "that most of those papers were highly partisan and inflammatory." As University of North Carolina law professor David Lange described America's first set of scribes:

[3]The task of determining *objectively* what controversies should be covered on 1200 television and 9000 radio stations, who should speak to them, and when and for how long they should be discussed, is simply a monstrous chore. The Commission has never entertained any death-wish to undertake it.

[4]As Thomas Krattenmaker and Lucas A. Powe, Jr., reported in 1985 in the *Duke Law Journal*, the FCC "has only once held a broadcaster to have violated the obligation to cover controversial issues." This single exception proves the rule: the complaint was filed by a group of investors who wanted to be reassigned the frequency of a classical-music station that broadcast nothing but the works of great composers. They complained about blandness not as listeners, but as capitalists—and won themselves a station.

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> In fact, the press of that day was almost entirely partisan. The economic and political circumstances in which publishers found themselves invited, if they did not require, an alliance between each publisher and some patron in power....
>
> Not until the middle of the Nineteenth Century did the partisan press begin to pass largely out of existence. But its passing did not mark the emergence of a new period of altruism. Instead, the partisan press simply fell victim to circumstances which would in time lead to the mass media as we now know them. During this period, for example, the proprietors of the "penny press" discovered that mass circulation revenues were a profitable alternative to patronage....
>
> The concepts of fairness and responsibility that we now routinely demand of the media did not emerge until this century.

The chilling effect of *Red Lion*

Waxing nostalgic about a pristine era of unbiased reportage—an age eclipsed by big-business domination of media outlets—is not a useful way to think about regulating media fairness. A more realistic approach would examine the actual regulatory institutions that arose, focusing on real actors influenced by real political and economic forces. While many recent volumes have done just this, the same effect can be achieved by examining just one Supreme Court case: *Red Lion Broadcasting Company* v. *FCC* (1969), the prevailing precedent delineating the First Amendment rights of broadcasters.[5]

The Reverend John M. Norris owned a small, daylight-only radio station in Red Lion, Pennsylvania. By the mid-1960s the local market could boast of a twelve-channel cable-television system, seven broadcast-television stations, and twenty AM and twelve FM radio stations. Rev. Norris's WGCB was far from the most powerful of these; indeed, customers could buy one hour of its most expensive time for twenty-five dollars. But the radio outlet found its own market niche, broadcasting a continuous flow of right-wing religious programming.

It was the Reverend Billy James Hargis's "Christian Crusade" that focused federal attention on WGCB. After the 1964 elections, Hargis launched an attack on Fred Cook, a journalist who had gone to work for the *Nation* after having apparently been fired by the *New York Times*. Cook had written a book called *Goldwater: Extremist on the Right*, highly critical of the recently defeated

[5]Examinations of the four other most important Fairness Doctrine cases yield strikingly similar conclusions. (See Krattenmaker and Powe, pp. 169-174.)

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Republican presidential candidate. Upon discovering the tome, Hargis used his radio forum to denounce Cook as a "professional mudslinger" whose book, he claimed, was largely false. His colorful attack consumed two minutes of a fifteen-minute commentary aired on November 25, 1964. The segment cost Hargis's operation $7.50.

Although he had not been listening to WGCB at the time, Cook soon became aware of the Hargis broadcast, and wrote to the station demanding equal time to respond to the personal attack. Norris invited him to do so by sending him a rate card, offering to sell response time on the same terms available to Hargis. Cook declined the offer, and when free time was not forthcoming, filed a complaint with the FCC. The FCC informed the station that it was shirking its public-interest obligations, whereupon Norris sued in federal court. The Supreme Court voted 8-0 (with Douglas not participating) to uphold an appellate ruling that Norris's Red Lion Broadcasting Company had indeed run afoul of the constitutionally sound Fairness Doctrine. Its reasoning relied heavily on Frankfurter's physical-scarcity rationale for regulation:

> Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard. Consequently, the Federal Radio Commission was established to allocate frequencies among competing applicants in a manner responsive to the public "convenience, interest, or necessity."

Though the Court accepted completely the fanciful history and faulty logic of *NBC*, it had committed an even more embarrassing sin: it had been taken in by the Democratic National Committee (DNC). Recent evidence not available to the Court in 1969 has revealed that the federal enforcement mechanisms that the Fairness Doctrine put at the disposal of political interests were used flagrantly to suppress dissent in precisely the manner that led the Founders to fear governmental control of the press. The historic *Red Lion* decision was simply the successful end of a concerted campaign to silence a political viewpoint unpopular with those who held the power to regulate the press in the mid-sixties.

Fred Cook's attack on Barry Goldwater was not disinterested; the volume was published only upon the pre-publication commit-

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ment by the DNC to purchase 50,000 copies (the majority of the total eventually sold). The book was a calculated attack by self-interested partisans—and entirely protected under the First Amendment.

But the Democrats' secret financing of attacks on their political opponents was where the story began, not where it ended. During the Kennedy administration's 1963 campaign to enact a nuclear test-ban treaty, the DNC had initiated a national effort to monitor right-wing broadcasters. The DNC found that under a recent FCC ruling, it could effectively force radio stations airing anti-Administration editorials to broadcast countering views for free, and that the obligation for such "fairness" taxed stations that aired hostile opinions. In the words of Nicholas Zapple, counsel to the Senate Communications Subcommittee, the DNC realized that it could "use the Fairness Doctrine to counter the radical right." Bill Ruder, Assistant Secretary of Commerce in the Kennedy administration, confirmed this: "Our massive strategy was to use the Fairness Doctrine to challenge and harass right-wing broadcasters and hope that the challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue." Thus the real goal was not enhanced public debate of important issues, but the silencing of opposition speakers.

The *Red Lion* case was part of this strategy. The DNC, carefully monitoring the radio market, compiled a list of stations that had aired Billy James Hargis's attack on the Goldwater book, and passed it on to Cook with legal and strategic advice on how to frame his right-of-reply demand. The FCC order that WGCB provide equal time at no cost was a victory for the DNC intimidation campaign. The DNC had alertly devised a scheme to subsidize speech favorable to Democrats with no obligation for balance or "fairness," while taxing speech critical of Democrats—all in the very same project. In this, the U.S. Supreme Court served as an unwitting accomplice.

The "scarcity" paradox

The noted journalist A.J. Liebling once complained that freedom of the press applies only to those wealthy enough to own one. He was right, but he missed the alternative. The publisher or broadcaster may have some money to throw around, but generally not to waste. American media moguls, at any rate, aim to make a profit. They are constrained by the market forces that determine

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what people will buy and, importantly, which journalists will work. The system is not ideal; you may have read *USA Today*, you may have seen "Donahue." But it is what the people want, subject to some constraints.

Not the least of these constraints is imposed by the FCC, which is notoriously parsimonious in licensing television stations. Home viewers could receive many more channels than they now do; any conceivable technical capacity constraints are far less severe than those imposed by policy. Because the available channels are so limited, they carry extremely high opportunity costs, and hence television programming tends to aim at the lowest common denominator. Only with expanded dials will more sophisticated specialty interests be accommodated, let alone cultivated. With the advent of cable and broadcast-satellite transmissions, we are seeing precisely this widening of choice. As 52 percent of all U.S. households now subscribe to cable, and over 90 percent of these enjoy choosing among more than twenty channels, viewers are increasingly defecting from the more vapid offerings of mass television.

Yet the federal government resourcefully attempted to withhold new information and entertainment technologies from the public altogether, as a well-appreciated favor to established broadcasting interests. Cable, satellite, microwave, and great chunks of additional VHF-UHF spectrum space have been claimed by American science, only to be forbidden by American regulators. Until the mid- to late 1970s, for instance, cable systems were virtually prohibited from entering the top fifty television markets in the U.S., specifically to protect the interests of entrenched television broadcasters. The FCC, which derived its authority from the "physical scarcity" of the airwaves, actually gained jurisdiction over a non-scarce medium (cable) because any competition to broadcasters would diminish the ability of the federal government to promote the public interest. But allowing competition to lower broadcasters' profits and to expand consumer choice is surely in the public interest, illustrating the anti-consumer premise at the core of the FCC's regulatory mission.

The paradox is rich: competition in broadcasting has been purposely suppressed because it would weaken the FCC's ability to regulate in the public interest—which is necessary because of "physical scarcity." So "physical scarcity" justifies the artificial *creation* of scarcity. If you think you smell a rat, your nose is working.

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The Doctrine's appeal

Still, stripped of the analytics of physical scarcity and the history of political chicanery, calls for "fairness" are intuitively appealing.[6] Indeed, the broadcast industry's cry for deregulation under the Constitution has been seen by some as a cynical corporate attempt to hide behind civil liberties. Dave Kaufman, writing in the television trade paper *Daily Variety*, says that the Fairness Doctrine "mandates that both sides of an issue should be presented to assure the public will be given fair coverage." "Why," he writes, "is it such a hardship to be fair in airing issues of interest to the public?"

Kaufman makes the obvious inquiry, and Potter Stewart preemptively supplied the appropriate answer in his 1973 *CBS* v. *DNC* opinion: "Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that 'fairness' was too fragile to be left for a government bureaucracy to accomplish."

When the issue is stated as one of simple fairness, we wait for a simple definition. Kaufman shoulders without concern the curious burden of defending governmentally mandated fairness in an article entitled "FCC, Broadcasters Ignoring Fair Play in Fairness Doctrine Battle." Not only does he not appreciate the pervasiveness of honest disagreements over fairness, but he also errs by parroting the traditional definition: mandating that "both sides of an issue" be presented suggests that just two points of view are worthy of discussion. Moreover, it begs the all-important questions: Which views appropriately constitute "both sides"? Still more fundamentally, who gets to decide which topics should be debated? If I am subjected to a series of eminently "fair" debates on the question of Soviet genocide in Afghanistan, I am likely to emerge with a markedly different worldview than an identical individual who continually witnesses equally unbiased discussions of the American use of Agent Orange in Vietnam.

That Reed Irvine and Phyllis Schlafly believe in the salvation of their agendas by FCC enforcement of the Fairness Doctrine every bit as strongly as do Ralph Nader and Edward Markey proves only that rightists and leftists both believe that the mass media are dominated by their ideological opponents. Both look to the Fair-

[6]Which is precisely why Orwell might have so enjoyed the term "Fairness Doctrine."

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ness Doctrine for their salvation.[7] Where both left and right err, however, is in their belief that governmental regulation will somehow guarantee a hearing for politically controversial minority opinions. No one would argue that mainstream views—assuming that we can define them—are to be slavishly enforced as our standard of fairness; the mainstream views of one generation, region, or class often prove dangerously wrong-headed. Yet mainstream views are all one can reasonably expect to emerge from a political regulatory process, since it would be irrational to define some minority viewpoint as the norm around which "fair" debate should be calibrated.[8] Since fairness is indefinable in the abstract, prudent management confronted with the Fairness Doctrine will attempt to identify a corridor of mainstream views as *acceptable to the regulatory authorities*, and produce a balanced distribution around such a perceived mean.

If the hostile reaction of many constitutionally protected newspaper pundits to the Doctrine's repeal is philosophically surprising, the interest of legislators in "fairness" is straightforward. Legislators are decidedly in favor of regulating the content of broadcasts; despite strong deregulation pressure from the National Association of Broadcasters—a considerable political force—Senator Hollings's 1987 bill to codify the Fairness Doctrine passed the Senate by 59-31 and the House by 302-102 before it was vetoed. This fondness for regulation is motivated by self-interest; as Timothy Dyk has observed in the *Yale Journal on Regulation*, "Congress has been particularly concerned with content regulation designed to serve the interests of congressional candidates." The equal-time rule, giving political candidates the right to whatever air time is allotted to their opponents, has been mandated by Congress since the very inception of broadcast regulation, the Radio Act of 1927.

[7]A more direct, nonideological self-interest may be at work here as well. Policy entrepreneurs want to represent their constituencies against perceived opponents. Having the standing to lobby and even to bring formal legal complaints under the Fairness Doctrine expands the set of instruments with which they may supply their respective markets. The Doctrine brings such activists into a new loop that can increase the demand for their services no matter what the eventual outcome. In any event, the opportunity to be part of the content-control loop is seductive, and people from virtually all political vantage points—including, since the 1920s, the American Civil Liberties Union—seem to succumb to the urge.

[8]Of course, the FCC has often taken this course, defining Fairness Doctrine requirements (and public-interest obligations generally) according to the prejudices of the political elites with effective agency control.

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The notion that Congress would voluntarily promote any truly unbiased form of access to the news media is simply incredible. In numerous policy decisions over the past two decades, Congress has had ample opportunity to legislate fairness in its very own marketplace: the competition for congressional seats. In determining staff funding levels, franking privileges, campaign-finance reforms, and many other policies, the members of the House and Senate have repeatedly redrawn the rules of their game. Their commitment to establishing an equal playing field is apparent in the fact that 98.4 percent of the incumbents standing for House reelection in 1986 won. Of these, nine in ten won by more than 60 percent. In 1988 the House reelection rate actually rose.

Imagine the absurdity of unregulated religion in America. With quack churches and rogue ministers, billions of dollars are wasted on ventures that God only laughs at. People are left to the mercies of wealthy preachers controlling vast empires, unaccountable to any agency, appearing unchallenged on powerful television networks, able to ignore or subvert the true spiritual interests of those who follow them.

Consider the alternative: a religious marketplace regulated by a Plausibility Doctrine, whereby each organized church is subjected to the simple federal standard of Plausibility. Is that not a plausible way to control religion in a free society? No more than the Fairness Doctrine is a fair way to regulate broadcasters.

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The paradox of the exclusionary rule

CALEB NELSON

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

—*The Fourth Amendment*

IN 1914, one hundred and twenty-three years after the ratification of the Fourth Amendment, the Supreme Court declared that the Amendment was "of no value" if unconstitutionally seized evidence could be used in federal courts. The Court held all such evidence inadmissible.

This exclusionary rule was entirely the invention of the Court, not the Framers. Indeed, only thirty-five years later the Court confessed that the rule was not a necessary corollary of the Constitution; in 1949, though it decided that the Fourteenth Amendment applies the Fourth Amendment to the states, it nonetheless refused to impose the exclusionary rule on state courts. In 1961,

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however, the Court again changed its mind, extending the "constitutionally required" rule to the states in the landmark case of *Mapp* v. *Ohio*.

Much has been made of the extent to which the exclusionary rule frustrates justice by forcing the release of obviously guilty criminals. To all such criticism, civil libertarians have responded that the occasional release of the guilty is the price of liberty, and that the exclusionary rule protects everyone—innocent and guilty alike—from overly intrusive policemen. The debate over the rule has thus centered on how to balance the competing claims of justice and freedom.

But in fact no balance need be struck in order to assess the rule; civil libertarians should join law-and-order advocates in demanding its abolition. Growing evidence suggests that the exclusionary rule, in addition to freeing criminals, also encourages judges to undermine individual rights. As many legal scholars have suggested, a close look at Supreme Court cases of the past two decades indicates that the rule's existence is causing a steady constriction in the effective scope of the Fourth Amendment, as the Court condones questionable police behavior rather than suppress crucial evidence. The irony is unmistakable: just as the 1914 Court twisted the Constitution to invent the exclusionary rule, so the modern Court invents legal theories to circumvent the rule, unintentionally but inevitably eroding the very rights that the rule was created to protect.

The exclusionary rule and crime

The Court's motives are clear. Within ten years of *Mapp*, researchers had begun to argue that the exclusionary rule was responsible for the release of many hardened criminals. The most influential early work was that of University of Chicago professor Dallin Oaks, whose 1970 law-review article summarizing past studies and announcing new data instantly attracted widespread attention. Professor Oaks examined twelve sample days in the proceedings of two Chicago courts, and found that motions to suppress evidence were filed in 34 percent of the narcotics prosecutions and 36 percent of the concealed-weapons prosecutions. Two-thirds of the weapons motions and 97 percent of the narcotics motions were granted. Every single case in which the motion was successful was subsequently dismissed, since crimes of possession cannot be prosecuted when the illegal objects are not available as evidence. Thus

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the exclusionary rule ensured that a third of Chicago's narcotics cases and a quarter of Chicago's weapons cases were never tried.

Chicago was perhaps atypical—proponents of the exclusionary rule charged that the city's police willfully and routinely violated the Constitution—but researchers in other jurisdictions agreed with Oaks that the exclusionary rule doomed many criminal prosecutions. In California (where at the time the rule was slightly stronger than elsewhere because of provisions in the state constitution) a National Institute of Justice study concluded that many cases involving illegal searches were rejected for prosecution before ever reaching a suppression hearing. Between 1976 and 1979, for instance, almost three thousand felony drug cases in California were not prosecuted because of search-and-seizure problems; what is more, nearly half of the defendants who were not prosecuted in 1976 or 1977 because of such problems were rearrested within two years on new charges. Another analysis of California data estimated that up to 7.1 percent of all felony drug arrestees may have been released because of the exclusionary rule. Other researchers suggested that prosecutors, rather than risk the suppression of their key evidence, often accept lenient plea bargains.

Proponents of the rule responded with a 1979 study conducted by the General Accounting Office, which found that only 1.1 percent of all federal criminal defendants were freed by the suppression of evidence. But there is reason to believe that the exclusion of evidence causes more trouble in state courts than in federal courts, because crimes of possession tend to be state crimes.

In any event, everyone agreed that regardless of percentages, the exclusionary rule frees a large number of criminals. As studies of the rule's effects began to pile up, and as the rule's defenders left the Court, the justices became less willing to apply the rule.

Erosion of the rule

Dallin Oaks's article quickly attracted the Supreme Court's attention. In a 1970 dissent, then-Chief Justice Warren Burger relied on it extensively to conclude that the Court should reverse direction: "Some clear demonstration of the benefits and effectiveness of the exclusionary rule is required to justify it in view of the high price it extracts from society—the release of countless guilty criminals."

Indeed, as early as 1965, when the Court refused to apply *Mapp* retroactively, the majority arrived at its decision by weighing the

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social costs of applying the rule against the social benefits. In the following years, the Court used this balancing test extensively, and the scales tipped increasingly against the suppression of evidence. The turning point was the 1974 case of *U.S.* v. *Calandra*, in which the Court reverted (again) to the position that the exclusionary rule is not mandated by the Constitution. "In sum," the Court concluded, "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." Notwithstanding the Court's prior rhetoric, the use of illegally seized evidence "work[s] no new Fourth Amendment wrong," and hence the rule is properly "restricted to those areas where its remedial objectives are thought most efficaciously served."

The Court was certainly correct that there is no "personal constitutional right" to the suppression of evidence. The problem is that there *is* a personal constitutional right to be free from unreasonable searches and seizures, and under current practice its scope is largely determined by the scope of the exclusionary rule.

Aside from the rule, there are two major formal checks on policemen: the internal disciplinary apparatus of their departments, and the threat of civil or criminal actions against them. The exclusionary rule's existence hampers both of these mechanisms, but especially the first. If evidence gathered by questionable means might be needed in a trial, police departments have reason to refrain from punishing the investigating officers, or at least to delay for years. To discipline them before the case is conclusively settled would be to admit that the evidence was illegally seized and should be suppressed.

Civil suits and criminal charges can sometimes be brought against offending policemen. But the law is constructed, properly enough, so that policemen who unknowingly overstep their authority in a good cause are not held personally accountable; the threat of direct legal sanctions applies only to willful violations of the Fourth Amendment, and hence such sanctions are almost never imposed. Yet the effectiveness of even this last-ditch measure is currently linked to the exclusionary rule. Under the current system, when courts decide against excluding unconstitutionally seized evidence, juries may be more inclined to absolve the offending policemen.

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To at least some extent, then, courts now must choose between condemning police misconduct and punishing criminals. As the principal mechanism to enforce the Fourth Amendment, the exclusionary rule reacts to one injustice by countenancing another; in Cardozo's famous words, "the criminal is to go free because the constable has blundered." Even when the rule is applied, the constable himself rarely suffers any direct punishment—except the guilty knowledge that his misconduct has freed a criminal to prey once more on society.

This system makes little sense, and so since *Calandra* the Court has steadily narrowed the exclusionary rule. It began by holding the rule inapplicable in certain special proceedings such as grand-jury hearings and civil actions, citing the societal costs imposed by a rule that "deflects the truthfinding process and often frees the guilty." And the Court soon began to erode the rule in criminal trials themselves.

In *U.S.* v. *Ceccolini* (1978), for instance, the Court went against a long history of suppressing evidence gathered on the basis of unconstitutionally obtained information, by permitting the testimony of a witness whose identity was discovered in an unconstitutional search. In December 1974 a police officer had entered the shop of a florist named Ceccolini to chat with the sales clerk. He noticed an envelope on the drawer of the store's cash register, and saw some money protruding from it. For no apparent reason, and without any authorization, he opened the envelope and sorted through its contents, observing that it contained betting slips as well as money. He asked the clerk about the envelope, and she told him that the store's owner had asked her to give it to someone. The policeman notified federal gambling investigators, who obtained the cooperation of the sales clerk; on the basis of her testimony, Ceccolini was convicted of perjury. The lower federal courts invoked the exclusionary rule to set aside the conviction, but the Supreme Court reversed this decision. It reasoned that since the policeman was not investigating gambling offenses when he examined the envelope, suppressing the clerk's testimony "could not have the slightest deterrent effect" on similarly situated policemen.

Despite this claim, under *Ceccolini* policemen have a positive incentive to conduct idle unconstitutional searches. As long as they are not investigating particular crimes or expecting to acquire evidence—in other words, as long as they are merely nosing around instead of acting upon probable cause—they might uncover useful

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witnesses. It is probably true that the social costs of suppressing testimony in cases like *Ceccolini* would outweigh the benefits. This fact, however, argues for the abolition of the rule and the creation of a more fine-tuned mechanism to deter police misconduct.

Yet rather than reach this conclusion, the Court has simply continued its *ad hoc* use of the balancing test to avoid suppressing evidence. In *Nix* v. *Williams* (1984), for example, the Court sidestepped abolition by establishing a new exception to the exclusionary rule: "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means ... then the deterrence rationale has so little basis that the evidence should be received." Under the *Nix* doctrine, once a lawful search with a high probability of success has been started, police can ignore constitutional requirements in order to accelerate the process, with only the notoriously ineffective threat of civil suits to give them pause. The suppression of evidence is at least as likely to deter this kind of misconduct as it is to deter any other violation; to judge by appearances, the majority created the inevitable-discovery exception because it badly wanted to admit the challenged evidence—the corpse of a ten-year-old girl murdered by the defendant. As Justice Stevens admitted in his concurring opinion, "There can be no denying that the character of the crime may have an impact on the decisional process."

It is true that the Court, even after *Calandra*, has sometimes ruled that unconstitutionally seized evidence in a murder trial should have been suppressed. But *Nix* shows that when the balancing test suggests a plausible exception to the exclusionary rule, the Court is eager to admit the challenged evidence. Lower courts are often even quicker to scuttle the rule.

The good-faith exception

Judicial hostility to the exclusionary rule is sensible, but as long as the rule exists this hostility will lead to reductions in the effective scope of the Fourth Amendment. Consider, for example, the "good faith" exception to the rule, created in *U.S.* v. *Leon* (1984). The *Leon* majority catalogued the various ways in which the exclusionary rule frustrates justice, paying particular attention to the California studies about the number of criminals freed by the rule. Although the Court observed that other researchers had found the rule not to interfere substantially with the search for truth, it

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argued that "the small percentages with which they deal mask a large absolute number of felons who are released because the cases against them were based in part on illegal searches or seizures." Applying a cost-benefit analysis, the Court held that evidence seized by police acting "in objectively reasonable reliance" on a warrant issued by a "detached and neutral magistrate" should be admissible in trial, even if the warrant later fails judicial scrutiny.

The Court soon indicated that the issuing magistrate need not be remotely competent in order to meet the good-faith standard. On May 5, 1979, a brutally murdered body was discovered in a vacant lot in Boston. In the course of their investigation, police discovered probable cause to search the home of one Osborne Sheppard. Unable to find any unused warrant applications, they altered a previously used form and presented it (with an explanation) to a judge; he made some changes of his own and assured the police that the revised warrant gave them ample authority to search Sheppard's house for evidence of murder. In the house police found bloodstains on the floor, various bloodstained articles of men's and women's clothing, and a wig later identified as the victim's. But the warrant authorized police to look only for "any controlled substance, article, implement or other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance...." Apparently no one—policeman or judge—had actually read the warrant at any point during the editing process. Nonetheless, in a decision released on the same day as *Leon*, the Court held in *Massachusetts* v. *Sheppard* that police reliance on the warrant was "objectively reasonable," even though the police did not know what it said.

The Court extended the good-faith standard in *Illinois* v. *Krull* (1987), holding that evidence seized in objectively reasonable reliance on a statute authorizing warrantless searches should not be suppressed even if the statute is later found to be unconstitutional. Again, the Court justified this decision by appealing to the balancing test, citing "the substantial social costs exacted by the exclusionary rule." Recently President Bush has asked Congress to create a general good-faith exception to the rule.

The President and the Court are doubtless correct that society is better served by an exclusionary rule with the good-faith exception than by one without it. But the exception is no panacea. While a policeman who truly believes himself authorized to conduct a search would never have been deterred by the exclusionary rule,

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the good-faith exception undercuts a broader kind of deterrence: its existence discourages police departments from training their agents in constitutional practice.

As many critics have observed, the good-faith exception is a defense tailor-made for policemen who are not fond of civil liberties. Officers who knowingly violate the law of search and seizure will have few moral scruples against perjuring themselves to convince judges of their good faith. If they succeed, they face no punishment.

In addition, the good-faith exception eliminates any possibility that the exclusionary rule will deter magistrates and legislatures from authorizing unconstitutional searches. Under *Leon*, searches and seizures based on warrants that are only facially valid, and that are issued on some minimal showing of cause, are effectively just as acceptable as searches and seizures based on truly valid warrants. (Indeed, under *Sheppard* the warrant need not even be facially valid, as long as the police reasonably think that it is.) The bright side is that warrants can be issued only one at a time; *Krull* permits a state legislature to give blanket authorization for unconstitutional searches, as long as an average person moderately familiar with Supreme Court holdings would not instantly recognize the statute's unconstitutionality. Under the current exclusionary rule, the Fourth Amendment no longer protects against searches and seizures that are unreasonable, but only against searches and seizures that are egregious.

Searches of third parties

Sometimes it does not even do that.

In 1972 an IRS agent asked private detective Normal Casper to investigate people who had bank accounts at the Castle Bank in the Bahamas. Casper devised a plan, approved by the agent, to get access to bank records. He introduced one of the bank officers to Sybol Kennedy, a female private investigator who had an apartment in Miami. On January 15, 1973, the bank officer went to the apartment, dropped off some baggage, and took Kennedy to dinner. While they were out, Casper entered the apartment with a key given him by Kennedy, took the bank officer's briefcase, and handed it over to the IRS agent. Under the agent's guidance, the papers in the briefcase were photocopied, as an operative kept tabs on the couple to make sure that the briefcase was returned before being missed. Acting on information found in the briefcase,

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investigators discovered that Jack Payner, one of the bank's American depositors, had falsified his 1972 tax return.

In the ensuing case of *U.S.* v. *Payner* (1980), the Supreme Court observed that "[n]o court should condone the unconstitutional and possibly criminal behavior of those who planned and executed this 'briefcase caper.' " But it held that Payner had no standing to suppress the illegally seized documents, because his own Fourth Amendment rights had not been violated; it was the bank officer's briefcase, not his, that was rifled. Since the bank officer had committed no crime, he was in no position to benefit from the exclusionary rule. Hence the Court's analysis robbed the rule of any possible value in deterring illegal searches of the possessions of innocent third parties.

The logic in *Payner* was nothing new; from 1969 on, the Court has held that Fourth Amendment rights cannot be vicariously asserted. But during the heyday of the exclusionary rule, standing rights were much broader than they are now; the Court granted "automatic standing" under the Fourth Amendment to all people charged with crimes of possession, and it also accorded standing to everyone "legitimately on the premises" that were searched. As the Court became aware of the social costs of this doctrine, however, it gradually replaced these standing rules with the standard applied in *Payner*. Ever since a 1980 case in which the Court refused to suppress evidence unconstitutionally seized from the apartment of the mother of an accused thief, defendants have had to prove both a possessory interest in the evidence seized and a legitimate expectation of privacy in the area searched in order to have standing under the Fourth Amendment. In the words of the *Calandra* majority, the Court's dissatisfaction with the broad standing rules "is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search." Yet the Court has never explained why criminals deserve more protection from unreasonable searches and seizures than innocent third parties.

The potential for police abuse is obvious. Indeed, according to the lower court in *Payner*, "the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties...." While the Supreme Court was probably correct to find

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that the costs of the broad standing rules outweigh the benefits, the new standing limitations are a second-best solution.

Erosion of the Fourth Amendment

Even though erosion of the exclusionary rule, under the current system, reduces the effective scope of the Fourth Amendment, there is a bright side: it paves the way for the rule to be abolished entirely. There is no bright side to the other method that the Court has used to avoid suppressing relevant evidence: eroding the Fourth Amendment itself.

Consider two cases involving questionable searches of automobiles—one decided several years before the Court began trying to circumvent the exclusionary rule; the other, several years after.

The first case is *Preston* v. *U.S.* (1964). Late one night in Newport, Kentucky, police were alerted to the fact that "three suspicious men acting suspiciously" had been sitting in a parked car for five hours in a business district. Four officers went to investigate, and received no satisfactory explanation from the men. Although one of the men had legally bought the car on the previous day, he could produce no title to it, and between them the three men had only twenty-five cents. The men were arrested for vagrancy, and police had the car towed to a garage. After the men had been booked, officers searched the car without a warrant, and found two guns. The officers returned to the station, where one was told to go back and search the locked trunk as well. Getting into the trunk by removing the back seat, he found nylon masks, rope, and a counterfeit license plate. These items were later used in a federal trial to convict Preston and his companions of conspiracy to rob a federally insured bank. Although the Supreme Court was willing to assume that the police officers had the right to search the car at the time of the arrest (either to protect themselves or because they had reason to think that the car had been stolen), it held the actual searches unconstitutional because they were "too remote in time and place to have been made as incidental to the arrest." The Court therefore suppressed the evidence that the policemen had unearthed.

The second case is *Cady* v. *Dombrowski* (1973). Chester Dombrowski was a Chicago policeman. On the morning of September 11, 1969, he rented a car and drove from Chicago to Wisconsin. That night, after drinking heavily, he had an accident in the rented car. When police arrived to help, he told them that he was

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on the Chicago police force; the Wisconsin officers believed that Chicago policemen are required to carry their weapons even when they are off-duty. Although the Wisconsin policemen observed that Dombrowski was drunk, they did not attempt to find his weapon at the time. They merely had the car towed to a private garage, where they left it unattended. Dombrowski accompanied the officers back to their station, where he was finally arrested for driving while intoxicated. He was taken to a hospital for overnight observation. Several hours after the arrest, a policeman went to the garage to look for Dombrowski's gun. While searching the rented car without a warrant, the policeman found various bloodstained articles in the trunk. After confronting Dombrowski with this evidence, the police learned through his attorney that there was a body on the farm of Dombrowski's brother. Largely on the basis of evidence found in the car, Dombrowski was convicted of first-degree murder in the death of the man whose bloody corpse was subsequently discovered. A federal appellate court later held that the evidence had been illegally seized and should have been suppressed, but the Supreme Court reversed this decision, holding the search constitutional.

This decision seems flatly to contradict *Preston*. The search's ostensible justification—the possibility that Dombrowski's car contained a legal but lethal weapon, which someone might steal or accidentally fire—was seriously undermined by the fact that the police had seen fit to leave the car unguarded for hours. But in any event, the *Preston* Court based its decision on the fact that at the time of the search "there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime[,] .... [n]or ... was there any danger that the car would be moved out of the locality or jurisdiction." The same was clearly true in *Dombrowski*. Indeed, unlike the petitioner in *Preston*, Dombrowski was not even in his car when he was arrested, nor was there any reason to believe that the car contained evidence of a crime.

Given a choice between imprisoning a murderer and reprimanding the police for a search that was far from flagrantly unconstitutional, the *Dombrowski* Court certainly made the right decision. It may well be, in fact, that the *Preston* standard gives police too little leeway in enforcing the law. But for better or for worse, civil libertarians should realize that without the exclusionary rule the Court would probably have stuck to its *Preston* analysis. In-

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stead, in the years following *Dombrowski*, it has steadily limited the Fourth Amendment protections that Americans enjoy in their cars.

While it is obviously impossible to say how Fourth Amendment law would have developed in the absence of the exclusionary rule, there can be no denying that the rule's existence gives judges at all levels a powerful incentive to condone questionable police actions. Proponents of the rule, however, counter that without the exclusionary rule, Fourth Amendment claims would never be litigated, and the Fourth Amendment rights that we now enjoy might never have been articulated.

While rights do ebb and flow with the Supreme Court's "interpretations" of the Constitution, this flux is not necessarily desirable. But in any event, the Supreme Court's commitment to the good-faith standard may well make further definition of the Fourth Amendment less likely than it would be without any exclusionary rule at all. In cases that meet the good-faith standard, judges need not reach subtle search-and-seizure issues; in cases that fail the good-faith test, the constitutional violations are sufficiently flagrant that judges have no opportunity to explore gray areas.

The Court, moreover, has recently used the balancing test to excuse itself from judging Fourth Amendment claims. On the same day that it released its *Leon* decision, for instance, it held that the exclusionary rule does not apply to deportation proceedings. The Court based its decision largely on the fact that the Immigration and Naturalization Service (INS) has its own mechanisms to deter its agents from violating the Fourth Amendment; hence the marginal additional deterrence that might result from application of the exclusionary rule is not worth the social costs. To some degree, then, the Court has ceded to the INS the right to develop its own body of Fourth Amendment law.

An alternative to the exclusionary rule

The Court's frequent invocation of the balancing test shows its powerful aversion to freeing criminals in order to defend Fourth Amendment rights. But if the exclusionary rule were abolished in favor of a sensible mechanism for directly punishing offending policemen, the Court's present dilemma would be resolved. As long as the sanctions were subject to judicial review, the Court could still pass on Fourth Amendment claims, without the distorting presence of the exclusionary rule.

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Perhaps the best alternative to the exclusionary rule that has yet been proposed is the creation of independent boards to review charges of official misconduct and to impose direct punishments. Allegations of police abuses could be brought before these boards by independent prosecutors, since regular prosecutors might hesitate to press charges against the policemen on whom their careers depend. The policemen, in turn, would be represented by lawyers. Although police perjury would still pose problems, good-faith violations would no longer have to go entirely unpunished; the board could fine the offending officers' departments and order them to step up their training efforts. More flagrant offenses could result in direct sanctions against the officers themselves.

Not only would this system end the exclusionary rule's distortion of constitutional law, but it would also improve the deterrence of official misconduct. Under the current system, the punishment for illegal searches falls on society, not the police. Although post-*Mapp* policemen are probably better trained and more aware of the Fourth Amendment than were their counterparts of the fifties, there is no guarantee that offending officers will ever find out about convictions lost because of the suppression of evidence, let alone learn the reasons behind the suppression. Nor, for that matter, is there any guarantee that they would care if they did find out; some police departments still base officers' performance ratings on their arrest totals, and pay less attention to how many of their arrestees are subsequently convicted. The review-board scheme would solve these problems.

In addition, since the boards would be able to consider illegal searches that turned up no evidence, they could extend the protections of the Fourth Amendment to the innocent as well as to the guilty. The boards would also be empowered to deal with police actions aimed solely at keeping the peace or at confiscating weapons and drugs; the exclusionary rule, by contrast, applies only when police are interested in prosecution. Direct sanctions against offending officers or their departments would be much more likely than the exclusionary rule to deter the few rogue policemen who willfully violate the Fourth Amendment.

The vast majority of policemen, who honestly try to follow the Constitution's commands, would also be better served by a system of direct sanctions. Currently, Fourth Amendment law is so convoluted that even experienced lawyers often do not know whether particular searches are likely to be upheld by the courts. Without

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the incentive to draw fine lines in order to admit evidence, judges could restore some order to their Fourth Amendment rulings. If search-and-seizure law were simpler, well-meaning officers would find it easier to obey the judiciary's Fourth Amendment standards.

Critics of direct sanctions assert that policemen would hesitate to conduct even lawful searches for fear of being brought before a review board to face the charges of vengeful criminals; too much deterrence of police is more dangerous to society than too little deterrence. But this argument ignores one of the principal advantages of the review-board scheme. While the suppression of evidence is an all-or-nothing response, the boards can make their punishments proportional to the offenses, thereby avoiding both underdeterrence and overdeterrence.

There will always be some tension between investigating crimes and protecting rights. If reform of the exclusionary rule gives judges less reason to restrict Fourth Amendment rights, it may hinder law enforcement. But to the extent that it makes the system more intelligible, it could both help policemen and make rights more secure. A rational legal system is a goal that both law-and-order advocates and civil libertarians should support.

Yet it is a goal that the exclusionary rule frustrates. Based on the decisions of his colleagues on the bench, D.C. Circuit Judge Malcolm Wilkey once wrote: "If one were diabolically to attempt to invent a device designed slowly to undermine the substantive reach of the Fourth Amendment, it would be hard to do better than the exclusionary rule." There is no reason for the Court to retain an artificial rule that impedes justice and distorts constitutional law when the rule's purpose can be better served by more sensible alternatives.

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Dropouts and Grownups

CHESTER E. FINN, JR.

JACKSON TOBY would let teenagers determine for themselves when they have had enough formal education ["Of Dropouts and Stay-ins: The Gershwin Approach," Spring 1989]. Instead of fussing about dropouts, he hopes to turn all schools into good and serious places by allowing youngsters who don't want to be good and serious students to leave. He cites George Gershwin's decision to leave school at fifteen as evidence that outstanding career success does not hinge on possession of a high school diploma.

Ignore for now the fact that Gershwin was uncommonly gifted, that his exit from formal education occurred seventy-seven years ago, and that the American society and work force have changed a bit in the ensuing decades. The Toby-Gershwin strategy might still be reasonable if education were wholly a private good, valuable only to the individuals acquiring it. As a society we do not, after all, oblige people to attend violin recitals or football games. These (and countless other experiences) we regard as volitional pleasures that are available to those who enjoy them, not as obligations imposed by the larger community. We do not force people to have their teeth cleaned, to exercise their muscles, to read the newspaper, or even to vote. Such actions may be socially desirable as well as individually worthwhile, but we still refrain from turning them into societal responsibilities.

Is schooling similarly to be deemed a personal option, desirable but voluntary? Or is education something that a decently functioning society obliges people to get a certain amount of, even if they don't really want to? Does not a concern for the general welfare move us to set certain minimal criteria for entry into adulthood, and to insist upon some standards of knowledge, skill, and behavior? Is there not a societal interest, as well as a private interest, in the acquisition of some level of education?

Maybe we ought not equate that level with the traditional American high school diploma, which too often represents no real intellectual attainment, but merely the stamina to sit in school for twelve years. Better, perhaps, is the principle embodied in the

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English "school leaver's examination," an actual measure of performance which, once passed, entitles youths to decide for themselves whether to continue with any more formal education.

Is it wise to compel future Gershwins to pass some sort of test of reading and writing, of math and science, of history and geography, before being allowed to quit school? I think so. The alternative is a burgeoning population of unskilled, semiliterate men and women, "grown up" only in physiological and chronological terms, unprepared for employment, citizenship, or parenthood.

SHOULDN'T people be able to figure this out for themselves? Given enough time, I do not doubt, many would. But few can be counted upon to do so at the age of fifteen or sixteen. This, I submit, is Toby's essential error—and the great blunder in our conventional approach to "dropout prevention." We consign to the youngsters themselves these important choices about whether to stay in school—and then we beat our breasts when they make the "wrong" decisions. Toby, it seems to me, would eliminate the breast-beating but not the bad decisions. It is my impression, as teacher, parent, and observer, that teenagers may be the least qualified people in the land to determine what is in their own long-term best interest, especially when the right decision means deferring immediate gratification in favor of prolonged hard work of a fairly boring sort. How many adolescents can be counted upon to choose what is good for them rather than what is pleasurable, easy, or popular?

For this reason, states have compulsory-attendance laws. But in most states, when you turn sixteen you get to decide whether to stay in school any longer. In some states, the age of decision is seventeen or eighteen.

Several states have begun to search for clever ways of prodding teenagers into making the right decision. West Virginia recently enacted a "no-pass, no-drive" law that denies driver's licenses to dropouts under the age of eighteen. (Exceptions are made for hardship cases.) This law is reportedly drawing dozens of youngsters back to school—though not necessarily for the sheer love of learning. The California legislature passed a similar statute (that Governor Deukmejian vetoed) and bills like it have been introduced in half a dozen other jurisdictions. The underlying idea, of course, is to make life at least mildly unpleasant for prospective dropouts by exacting an immediate cost of the sort that most adolescents will hate to pay.

But why do we leave it to boys and girls in their mid-teens to choose in the first place? Why, to get to the nub of the matter, are attendance laws written in terms of chronological age? This would make sense if our notion of education were purely custodial. But our mission should be to give young people an acceptable array of skills and knowledge to prepare them for adult society. So we

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should draft laws that say what we intend—that until you have those minimum skills you stay in school, regardless of age or preference.

Let us by all means exempt the retarded and others whom we cannot fairly expect to reach the prescribed level. But it would be better to have a norm and fuss about the exceptions than to have no actual educational standard, but merely an age level, to mark the end of formal schooling for Americans.

If that standard were calibrated to what a decently educated tenth grader should know, we would then have the functional equivalent of a school leaver's certificate. The average youngster might well earn it at the age of sixteen. Some would get there sooner; a number would take longer.

THE HIGH SCHOOL *diploma* could then evolve into a significant second certificate, earned on the basis of further study by those who decide that more learning is in their own best interest. The diploma would be pursued by young men and women who wanted to go to college, enroll in a technical-training program, or get a job requiring more than basic skills and knowledge. Since everyone in the advanced secondary program would already hold the first certificate, serious standards of intellectual achievement could fairly be established for the second one. Today we tend to confer a high school diploma on anyone who endures school for twelve consecutive years, which is why so many colleges and employers now see it as a flimsy credential. But as long as we slap the dread label "dropout" on all who lack a diploma, we are apt to remain squeamish about building rigorous standards into it.

There is more to succeeding in school, of course, than laws and norms. Many youngsters drop out not only because the statutes permit it but also because they have done badly in school. Rewriting and enforcing the law may keep them physically on the premises, and may concentrate their attention on learning enough to meet the exit standard—two steps in the right direction—but it won't guarantee success. And nobody welcomes the prospect of twenty-seven-year-olds huddled in high school classrooms because they cannot yet multiply two-digit numbers. Our proper goal is to help people learn, not to be punitive. So we need effective schools, too, featuring first-rate teachers, well-conceived curricula, good textbooks, the shrewd use of technology, strong leadership, and all the rest. These are the kinds of schools of which Jackson Toby also dreams. About this we have no dispute. But whereas he would let teenagers choose whether to attend them, I would insist on it.

Grown-ups, it seems to me, were placed on earth in order to make important decisions that children cannot make well for themselves. Few choices are more consequential—today, if not when Gershwin was a boy—than when to end one's formal educa-

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tion. Leaving that decision up to the kids does everyone a disservice.

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Coercion or Choice?

JACKSON TOBY

FEW CAN MATCH Chester Finn's wisdom about what ails American education. Consequently, his reluctance to permit secondary-school students to choose more freely whether to drop out forces me to reexamine my argument. I share his sympathy for youngsters who make the wrong choice, although I do not regard dropping out as irrevocable.† Further, I agree that George Gershwin and other successful dropouts are atypical. I cited them merely to demonstrate that dropping out of school is not disastrous for everyone. It is not like jumping off a cliff.

I regret that Professor Finn did not deal with my central concern, the educational process in schools. This process, I believe, is jeopardized by laws that forbid exit to fifteen-, sixteen-, and seventeen-year-olds who are convinced that formal education has nothing to offer them. Compelling unwilling adolescents to remain in school for their own good lowers the instructional level for other students and increases the level of school violence. The fate of dropouts, while worthy of analysis, was not my focus in the article.

Professor Finn and I agree on what we want the public schools to accomplish. Where we differ is on methods. I am convinced that coercion does not work with people in their late teens; some of them are bound to rebel, sabotaging the educational process for everyone. Instead I would attempt to *persuade* teenagers, with the help of their relatives, that schooling can prepare them for satisfying adult careers. If persuasion fails, as it will for some, I recommend leaving the schoolhouse door wide open so that dropouts can return to school if they so desire. My recommendations are pragmatic; I am delighted that coercion works with ten-year-olds. Chester Finn is pragmatic too. Although he may well believe that one cannot have too much education, I doubt that he would compel

†Neither does Chester Finn. In his article "The High School Dropout Puzzle," published in the *The Public Interest* (Spring 1987), he pointed out that about half of American dropouts eventually obtain the equivalent of a high school education.

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everyone to continue through college and graduate school. The question is: At what age are the individual and societal benefits of compulsory school enrollment outweighed by the economic and social costs?

I suggested that senior high school students should be given the responsibility to choose for themselves (and that junior high school students should not) because Japan follows this policy and Japan's high schools are excellent. Surprisingly, Chester Finn regards this proposal as radical. Yet it is not very different from current practice, except in its symbolism. Most American states compel school enrollment only until sixteen—that is, until about the completion of the tenth grade. Isn't the choice between continuing in school and dropping out more meaningful when it comes between junior and senior high schools than when it comes at one's birthday?

PROFESSOR FINN cites the West Virginia "no-pass, no-drive" law as an example of a clever program to keep children in school. He recognizes, by implication, that I am as skeptical of this dropout-prevention program as I am of most. A front-page story in the *New York Times* of May 21 reported that as a result of the new law, nearly 33 percent fewer West Virginia students dropped out of high school in 1988-1989 than in the previous academic year. I am not impressed. Were Chester Finn still the Assistant Secretary for Educational Research and Improvement at the U.S. Department of Education, I would implore him to award a grant to evaluate rigorously the effect of the West Virginia law. Perhaps such an evaluation would show that my skepticism is groundless, that youngsters kept in school by the threat of losing a driver's license learn without damaging the educational process for others. On the other hand, it might show that West Virginia's dropout-prevention program keeps bodies in school without engaging minds—except when involuntary stay-ins devise new ways to cut class, play hooky, and annoy teachers. It might also show that those who did drop out drove anyway, despite their inability to get licenses, and thereby ran the risk of arrest and prosecution.

The Safe Schools Study of 1978, conducted by the National Institute of Education, suggested a disadvantage to forcing older teens to remain in school. As part of the study, the National Center for Education Statistics collected data on criminal offenses that occurred in schools in the fall of 1974 and that were serious enough to be reported to the police. States with high ages of compulsory enrollment like Hawaii also had the highest rates of police reports. To me, these data suggest that compulsory-enrollment laws are more likely to create disorder than to compel "education" in any meaningful sense.

I do not oppose all dropout-prevention efforts, and I agree with the thesis of *What Do Our 17-Year-Olds Know?* by Diane Ravitch and Chester Finn; the ignorance of American teenagers about

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history and literature is deplorable. I am deeply suspicious, however, of dropout-prevention programs that keep students enrolled in high school without *motivating* them to learn what Ravitch, Finn, and I want them to learn. Instead of denying driver's licenses to dropouts, suppose that the State of West Virginia had included a map-reading section on the licensing test. The map-reading requirement would encourage some students to remain enrolled in high school in order to learn enough geography and reading skills to pass the test. But students who could pass the map-reading requirement would get their licenses even if they dropped out, and students who could not pass the test still might not find the incentive of the driver's license sufficient to justify remaining in school.

The difference between my version of the no-pass, no-drive program and the actual West Virginia law is the difference between the carrot and the stick. I prefer the carrot. Learning requires a cooperative relationship between teacher and students, which "stick programs" like the West Virginia law and the usual compulsory-attendance laws tend to destroy.

Professor Finn's reaction to my article surprised me, for we are brothers-in-arms in the educational-excellence movement. Apparently he thinks it is easier than I do for adults to coerce young people to do what we consider good for them. I agree that coercion works for at least three-quarters of the fourteen- to eighteen-year-olds. They want to live up to our expectations. Hence we can force them to remain enrolled or persuade them to do so without coercion, as Japanese high schools demonstrate. The remaining quarter constitutes the problem. I am grateful to Chester Finn for challenging me to explain my position further, but he has not changed my mind. I continue to believe that the coercive approach that he supports—with the best of intentions—contributes to the poor quality of public secondary education that we both deplore.

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